INDEX

325-839—62——1

[1] [1]

[2] Before Federal Trade Commission

Docket 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Complaint—September 4, 1958

The Federal Trade Commission, having reason to believe that the above-named respondent has violated Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Section 13), hereby issues its complaint as follows:

PARAGRAPH ONE: Respondent Jantzen, Inc., is a Nevada corporation with its offices and place of business located at Jantzen Center, 411 N.E. 19th Avenue, Portland 8, Oregon.

PARAGRAPH TWO: Respondent is principally engaged in the manufacture, distribution, and sale of clothing such as summer wear, sweaters, and children's wear.

PARAGRAPH THREE: These products are sold by respondent for use, or resale within the United States. Respondent causes them to be shipped and transported from the State of location of their principal place of business to purchasers located in States other than the State wherein shipment or transportation originated.

Respondent maintains a course of trade in commerce in such products among and between the States of the United States.

PARAGRAPH FOUR: Respondent ships and sells throughout the United States and world markets to some twelve thousand active accounts. Respondent is licensed to do business in eight states, four in the western United States and four in the eastern United States. Distribution is exclusively to retailers located in the various market areas throughout respondent's territories, and sales to retailers are made direct.

Respondent's annual volume of sales for the fiscal year ending August 31, 1957 was in excess of $44 million dollars.

[3] . PARAGRAPH FIVE: Respondent, in the course and conduct of its business in commerce, has been paying advertising allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of its products.

For example, respondent has for several years utilized standard printed cooperative newspaper agreements covering summer wear lines and sweater lines under which, in accordance with specified conditions, respondent pays fifty percent of advertising costs to the limit of five percent of the favored purchasers' total net purchases provided the initial order of a season for the merchandise involved amounts to $5,000.00 or more.

Such allowances were not made available on proportionally equal terms by respondent to other purchasers competing in the resale of respondent's products with those receiving the allowances.

PARAGRAPH SIX: The foregoing acts and practices of respondent, as alleged, violate Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Section 13).

WHEREFORE, THE FEDERAL TRADE COMMISSION, the Federal Trade Commission on this 4th day of September, A.D. 1958, issues its complaint against said respondent.

Notice

Notice is hereby given to the respondent hereinbefore named that the 18th day of November, A.D. 1958, at 10 o'clock is hereby fixed as the time and Portland, Oregon as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirteenth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

[4] If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to the facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 4th day of September, 1958.

By the Commission.

ROBERT M. PARRISH,
Secretary.

[5] Before Federal Trade Commission

[Title omitted]

Order Designating Hearing Examiner

Pursuant to authority vested in the Federal Trade Commission and delegated to the Director, Hearing Examiners,

It is ordered that Loren H. Laughlin, a hearing examiner of this Commission, be, and he hereby is, designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law.

EARL J. KOLB,
Acting Director,
Hearing Examiners.

[6] Before Federal Trade Commission

[Title omitted]

Order Cancelling Initial Hearing—November 14, 1958

Because of the pendency of negotiations for consent order and of conflict in the hearing examiner's calendar,

IT IS ORDERED that the initial hearing herein set forth in the "Notice" portion of the complaint for November 18, 1958, in Portland, Oregon, be and the same hereby is canceled, subject to being reset on ten days' notice to the parties.

LOREN H. LAUGHLIN,
Hearing Examiner.

NOVEMBER 14, 1958.

[7] Before Federal Trade Commission

[Title omitted]

Agreement Containing Consent Order To Cease and Desist—November 10, 1958

The agreement herein by and between Jantzen, Inc., respondent in Docket No. 7247, by its duly authorized officer and attorney, and Franklin A. Snyder, counsel supporting the complaint, subject to approval by the Bureau of Litigation, Federal Trade Commission, is entered into in accordance with Section 3.25 of the Rules of Practice and Procedure of the Commission. In accordance therewith the parties hereby agree that:

1. Respondent Jantzen, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at Jantzen Center, 411 N.E. 19th Avenue, Portland 8, Oregon.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 4, 1958, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

[8] b. The making of findings of fact or conclusions of law; and

c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Order

It is ordered that respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with the sale of clothing in commerce as "commerce" is defined in the amended Clayton Act do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of any customer of respondent as compensation, or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Signed this 10th day of November, A.D., 1958.

JANTZEN, INC.
By D. E. KENNEDY,
Vice President.

[9] JANTZEN, INC.,
Box 3300, Portland 8, Oreg.

LEE FINDERS,
Attorney for Respondent.

FRANKLIN A. SNYDER,
Counsel Supporting Complaint.

Approved:

ROBERT R. MACIVER,
Assistant Director,
Bureau of Litigation,

JOSEPH E. SHEELEY,
Director,
Bureau of Litigation.

[10] Before Federal Trade Commission

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Initial Decision of Hearing Examiner—December 2, 1958

Loren H. Laughlin, Hearing Examiner.
Franklin A. Snyder, for the Commission.
Lee Finders, Portland, Oregon, for the Respondent.

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondent with having violated the provisions of § 2(d) of the amended Clayton Act (U.S.C. Title 15, § 13) in certain particulars.

On November 25, 1958, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into and between respondent and the attorneys for both parties, under date of November 10, 1958, subject to the approval of the Bureau

of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Jantzen, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of [11] business located at Jantzen Center, 411 N.E. 19th Avenue, Portland 8, Oregon.

2. Pursuant to the provisions of the Clayton Act as amended, the Federal Trade Commission, on September 4, 1968, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and

effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order. [12] Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," said agreement is hereby approved and accepted and is ordered filed if and when said agreement shall have become a part of the Commission's decision. The hearing examiner finds from the complaint and the said agreement that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondent; that the complaint states legal causes for complaint under the Federal Trade Commission Act, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order, therefore, should be and hereby is entered as follows:

ORDER

IT IS ORDERED that respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

LOREN H. LAUGHLIN,
Hearing Examiner.

DECEMBER 2, 1958.

[13] Before Federal Trade Commission

Commissioners: JOHN W. GWYNNE, *Chairman*, ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, EDWARD T. TAIT.

In the Matter of

JANTZEN, INC., A CORPORATION

Decision of the Commission and Order To File Report of Compliance—January 16, 1959

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 16th day of January, 1959, become the decision of the Commission; and, accordingly:

IT IS ORDERED that respondent Jantzen, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission.

ROBERT M. PARRISH,
Secretary.

ISSUED: JANUARY 16, 1959.

[14] Before Federal Trade Commission

[Title omitted]

Joint Motion to Amend Decision

For the purpose of correcting minor errors in the initial decision in this matter which became the decision of the Commission on January 16, 1959, counsel for all parties jointly move the Commission to amend said decision by:

Substituting the phrase "the Clayton Act" for "the Federal Trade Commission Act" in line 10 in the unnumbered paragraph immediately preceding the Order in said initial decision.

It is agreed that this complaint was issued pursuant to the provisions of the Clayton Act as stated in paragraph 2 of said initial decision, rather than the Federal Trade Commission Act, as erroneously stated in the Agreement Containing Consent Order to Cease and Desist.

Respectfully submitted,

LEO FINDERS,
Attorney for Respondent.

FRANKLIN A. SNYDER,
Counsel Supporting Complaint.

[15] Before Federal Trade Commission

[Title omitted]

Order Granting Motion, Reopening and Modifying Decision—March 20, 1959

This matter having come on to be heard upon the joint motion of the respondent and counsel in support of the complaint requesting the Commission to correct an error in the decision herein by substituting the phrase "the Clayton Act" for "the Federal Trade Commission Act" in line 10 in the unnumbered paragraph immediately preceding the order in such decision, the parties having agreed that the complaint in this matter was issued pursuant to the provisions of the Clayton Act rather than the Federal Trade Commission Act; and

It appearing that the requested correction should be made:

IT IS ORDERED that the aforementioned joint motion of the parties be, and it hereby is, granted.

IT IS FURTHER ORDERED that this matter be, and it hereby is, reopened for the purpose of correcting the decision.

IT IS FURTHER ORDERED that the decision in this proceeding be, and it hereby is, corrected and modified by substituting the words "the Clayton Act" for the words "the Federal Trade Commission Act" appearing in [16] line 10 in the unnumbered paragraph immediately preceding the order contained in such decision.

By the Commission.

ROBERT M. PARRISH,
Secretary.

ISSUED: MARCH 26, 1959.

[17] Before Federal Trade Commission

[Title omitted]

Resolution and Order Directing an Investigation as to Whether Jantzen, Inc., Has Complied With Order To Cease and Desist—July 22, 1964

WHEREAS, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13, the Federal Trade Commission on January 16, 1959, after due process and proceedings of record herein and in accordance therewith, issued and served upon the respondent named in the caption hereof, an order to cease and desist under subsection (d) of Section 2, thereof; and

WHEREAS, by the said order to cease and desist the respondent Jantzen, Inc., and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from—

> [P]aying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration, for any services or facilities furnished by or through such customer in connection [18] with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products; and

WHEREAS, the said order to cease and desist, as modified on March 26, 1959, has not at any time thereafter been modified or set aside and is now, and has at all times since March 26, 1959, been in full force and effect; and

WHEREAS, the Commission has reason to believe that respondent, its officers, representatives, agents and employees, while engaged in the sale and distribution of clothing in commerce, may have violated the provisions of the said order to cease and desist; and

WHEREAS, it is deemed by the Commission to be in the public interest to ascertain whether or not and the extent to which respondent, while engaged in commerce, may have violated the provisions of the said order to cease and desist;

NOW, THEREFORE, IT IS RESOLVED AND ORDERED, that a non-public investigational hearing be conducted for that purpose pursuant to Section 1.35 and related sections of the Commission's Rules of Practice.

IT IS FURTHER RESOLVED AND ORDERED, that the Chief Hearing Examiner hereby appoint and designate a hearing examiner to preside at such hearing with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice, except that of making and filing an initial decision; and upon completion of the hearing, that the hearing examiner shall certify the record to the Commission with his report on the investigation; and that respondent shall have the right of due notice, of cross-examination, of production of evidence in rebuttal, and that the hearing shall be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

IT IS FURTHER RESOLVED AND ORDERED, that the hearings shall be held at such time and at such places as may be necessary, the initial hearing to be held at a place to be fixed by the said hearing examiner on a day occurring at least thirty (30) days after the service of notice thereof upon respondent.

[19] IT IS FURTHER RESOLVED AND ORDERED, that the Secretary shall cause service of this resolution and order to be made on respondent.

By the Commission.

JOSEPH W. SHEA,
Secretary.

ISSUED: JULY 22, 1964.

[20] Before Federal Trade Commission

[Title omitted]

Order Appointing and Designating Hearing Examiner

Pursuant to authority vested in the Federal Trade Commission and delegated to the Director, Hearing Examiners and

in conformance with order of the Commission issued July 22, 1964, directing that a nonpublic investigational hearing be conducted pursuant to Section 1.35 and related sections of the Commission's Rules of Practice, to ascertain whether respondent has violated the provisions of its order to cease and desist issued March 26, 1959, and that a hearing examiner be delegated to preside at such hearing.

It is ordered that Eldon P. Schrup, a hearing examiner of this Commission, be, and he hereby is, designated to preside at such hearings with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice consonant with the aforesaid order.

EDWARD CREEL,
Acting Director,
Hearing Examiners.

[21] Before Federal Trade Commission

[Title omitted]

Order Setting Investigational Hearing—October 12, 1964

Pursuant to the July 22, 1964 Federal Trade Commission Resolution And Order Directing An Investigation As To Whether Jantzen, Inc., Has Complied With Order To Cease And Desist" issued in Docket No. 7247 and now and since March 26, 1959 stated in said resolution and order to be at all times in full force and effect,

It is ordered that a non-public investigational hearing be held, to commence at 10:00 a.m., November 30, 1964, in the Court of Appeals Courtroom, United States Court House, Broadway and Main Streets, Portland, Oregon, for the purpose of taking testimony and other evidence concerning the nature and extent of compliance by Jantzen, Inc., with the order to cease and desist in Docket No. 7247, In the Matter of Jantzen, Inc., a corporation.

ELDON P. SCHRUP,
Hearing Examiner.

OCTOBER 12, 1964.

[22] Before Federal Trade Commission

[Title omitted]

Order Setting Prehearing Conference—November 18, 1964

By agreement between counsel and pursuant to Section 3.8 of the Rules of Practice for Adjudicative Proceedings,

It is ordered that this matter be set for a prehearing conference, to commence on November 23, 1964, at 10:30 a.m., in Room No. 7316, Federal Trade Commission Office, The 1101 Building, 11th Street and Pennsylvania Avenue, N.W., Washington, D.C., and that counsel for all parties meet with the Hearing Examiner for such conference at the aforesaid time and place. This conference will be stenographically reported.

ELDON P. SCHRUP,
Hearing Examiner.

NOVEMBER 18, 1964.

[23] Before Federal Trade Commission

[Title omitted]

Order Cancelling Hearing, Quashing Subpoenas, and Closing Proceeding Before Hearing Examiner—November 23, 1964

During the course of a prehearing conference held herein on November 23, 1964 in Washington, D.C., Commission counsel submitted a motion to close this proceeding before the Hearing Examiner together with an attached stipulation signed by Commission counsel and counsel for Jantzen, Inc. The said motion and stipulation made of record herein provide for the cancellation of the non-public investigational hearing heretofore set for Portland, Oregon on November 30, 1964 and the quashing of the subpoena issued to officials of Jantzen, Inc. requiring their attendance at said hearing. Accordingly,

It is ordered that:

(1) The non-public investigational hearing herein heretofore set for Portland, Oregon on November 30, 1964 be, and the same hereby is, cancelled.

(2) The subpoena *ad testificandum* issued on October 12, 1964 and addressed to Bruce Sturm, Advertising Manager, Jantzen, Inc., Post Office Box 3300, Portland,

Oregon, to appear and testify at the above Portland hearing, be quashed, and Mr. Sturm is excused from such appearance.

(3) The subpoena *duces tecum* addressed to Donald E. Kennedy, Vice President, Jantzen, Inc., Post Office Box 3300, Portland, Oregon, to appear, testify and produce documentary evidence at the above Portland hearing, be quashed, and Mr. Kennedy is excused from such appearance and making the said return.

[24] (4) The record in this proceeding before the Hearing Examiner be, and the same hereby is, now closed.

ELDON P. SCHRUP,
Hearing Examiner.

NOVEMBER 23, 1964.

[25] Before Federal Trade Commission

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Report and Certification to the Commission of Record of Investigational Hearing—January 14, 1965

ELDON P. SCHRUP, *Hearing Examiner.*

EDWARD G. GRUIS, ESQ., GERALD T. GREGORY, ESQ., *Counsel for the Commission.*

EDWIN S. ROCKEFELLER, ESQ., *Weld, Harkrader and Rockefeller, Counsel for the Respondent.*

I

THE ORDER TO CEASE AND DESIST

The initial decision herein, based on an agreement containing consent order to cease and desist entered into by respondent Jantzen, Inc., was adopted as the decision of the Commission on January 16, 1969 and is reported in 55 FTC 1065. In brief, the complaint in this consent matter charges the said respondent Portland, Oregon, clothing manufacturer, with

annual sales allegedly in excess of $44,000,000 for the fiscal year ending in 1957, to have violated Section 2(d) of the amended Clayton Act in its manner of granting advertising allowances to purchasers of respondent's products for competitive resale. The complaint alleges Jantzen, Inc. ships and sells throughout the United States and in world markets to some 12,000 active accounts, and the consent order to cease and desist provides as follows:

[26] "IT IS ORDERED, That respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as 'commerce' is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products."

II

STATEMENT OF THE PROCEEDING

The Commission, on July 22, 1964, resolved and ordered that a non-public investigational hearing be conducted to ascertain whether or not and the extent to which respondent Jantzen, Inc., while engaged in the sale and distribution of clothing in commerce, may have violated the provisions of the order to cease and desist issued against the said respondent and stated in said resolution and order to be at all times in full force and effect since modified on March 26, 1959.

The resolution and order further provided that the investigational hearing should be conducted in accordance with the Commission's Rules of Practice for Adjudicative Proceedings insofar as applicable, that no initial decision was to be made or filed, and that the hearing examiner, upon completion of the hearing, should certify the record to the Commission with his report on the investigation.

Pursuant to said Commission resolution and order, the undersigned hearing examiner, by order issued October 12, 1964, set a non-public investigational hearing to commence on November 30, 1964 in Portland, [27] Oregon for the purpose of taking testimony and evidence concerning the nature and extent of compliance by Jantzen, Inc. with the said order to cease and desist. Upon the application of Commission counsel, a subpoena ad testificandum and a subpoena duces tecum were at such time also issued to two officials of the respondent for their appearance at the said hearing.

Under date of November 18, 1964 and by agreement between counsel, a prehearing conference was ordered herein for Washington, D.C. on November 23, 1964 in advance of the Portland hearing. During the course of this conference a stipulation signed by respective counsel and an agreed to motion to close the proceedings before the hearing examiner were submitted and incorporated into the record and the conference was adjourned. On November 23, 1964 order issued as requested by the parties cancelling the non-public investigational hearing set for Portland, Oregon; quashing the subpoenas directed to the respondent's officials and excusing their appearance; and closing the record in the proceeding.

III

Report on the Record of the Investigational Hearing

The record of the investigational hearing consists of the forty-one (41) page transcript of the prehearing conference held in Washington, D.C. on November 23, 1964. Incorporated in the record at the direction of the hearing examiner by consent of the respective parties is the following stipulation signed by all counsel and set forth at pages 9–12 of the said transcript:

"Stipulation

Pursuant to the Resolution and Order of the Federal Trade Commission (Commission), dated July 22, 1964, directing an investigational hearing to determine whether or not Jantzen, Inc. (Respondent), has complied with provisions of the Commission's order to cease and desist, issued on [28] January 16, 1959, and modified on March 26, 1959; and in connection with

the Hearing Examiner's Order herein, dated October 12, 1964, setting the time and place to commence the investigational hearing, and the subpoenas issued herein by the Hearing Examiner to Donald E. Kennedy, Vice President of Jantzen, Inc., and Bruce Sturm, Advertising Manager for Jantzen, Inc.;

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the following is a true statement of facts:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as 'commerce' is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer, Loveman's, 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

[20] 3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by or through such

customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

IT IS HEREBY FURTHER STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the above admissions of order violations by respondent make unnecessary:

1. Compliance with the said subpoenas issued herein and counsel for the Commission and counsel for the Respondent agree and consent to having said subpoenas quashed.

2. Continuation of hearings herein to determine whether or not respondent has complied with the said order to cease and desist, and counsel for the Commission and counsel for the Respondent agree and consent to having all further hearings before the Hearing Examiner in this proceeding closed."

(Signatures.)

The foregoing stipulation of record shows that respondent Jantzen, Inc., in the course of its business in commerce, has admittedly failed to comply with the provisions of the order to cease and desist hereinbefore set forth, to the extent as follows:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer Loveman's, 800 Market Street, Chattanooga, Tennessee.

[30] (b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

The stipulation further states and the respondent admits that it made the foregoing advertising or promotional allowance payments without making such payments available on proportionally equal terms to all other customers competing in the distribution of the respondent's products with the aforementioned and other favored customers, and in so doing, that respondent has failed to comply with the provisions of the said order to cease and desist.

The Commission's attention is directed to the fact that the record further discloses at page 13 of the said transcript that, while counsel for the respondent has agreed to and signed the foregoing stipulation, said counsel has taken the position that "Jantzen does not concede either (1) that what the Commission has designated as an order to cease and desist of January 11, 1959 as modified March 26, 1959, was ever an effective order to cease and desist as provided by the law nor (2) that if the so-called 'order' was ever in fact a valid one provided by law, that there is at this time any method provided in law for the enforcement of such 'order.'" Counsel for the respondent continues his argument and elaborates on the position contended for at pages 14–17 of the transcript. Counsel for the Commission, at page 24 of the transcript, states his understanding of respondent's position on the Commission's jurisdiction and adds that he takes no exception to counsel for the respondent reserving his position on jurisdiction.

[31] IV

CERTIFICATION OF THE RECORD TO THE COMMISSION

The investigational hearing having been concluded, the aforedescribed record of the hearing in this matter is hereby certified by the hearing examiner to the Commission in accordance with the Commission Resolution and Order herein of July 22, 1964.

Respectfully submitted,

ELDON P. SCHRUP,
Hearing Examiner.

JANUARY 14, 1965.

[32] Before Federal Trade Commission

[Title omitted]

Application for Disposition of Investigation Under Section 1.21

Respondent Jantzen, Inc., hereby makes application, pursuant to Section 1.21 of the Commission's General Procedures, for informal disposition by the Commission of the investigation directed by its Resolution and Order of July 22, 1964, and for filing without further action of the Report of the hearing examiner dated January 14, 1965.

The requested disposition is appropriate and in the public interest at this time. Respondent has instituted effective procedures for insuring compliance with the order. In November 1963 (and, thus, prior to the Commission's Resolution and Order of July 22, 1964, directing this investigation), Respondent developed the plans and arrangement set forth in the [33] attached affidavit of Respondent's President with four exhibits. Respondent intends to and will comply fully with Section 2(d) of the Clayton Act in the future. Furthermore, this disposition will make it unnecessary to reach two difficult questions which would be presented by further proceedings and which could result in complex, extended, unnecessary litigation:

1. The question of the basic validity of the order to cease and desist of January 16, 1959, as modified March 26, 1959 (see pp. 14 and 15 of Transcript of Proceedings before Hearing Examiner); and

2. The question whether the laws of the United States now provide any method for judicial enforcement of Clayton Act orders to cease and desist issued prior to July 23, 1959 (see pp. 15 and 16 of Transcript).

PRAYER

WHEREFORE Respondent prays that the Commission dispose of this matter informally as provided in Section 1.21 of the Commission's General Procedures. Should the Commission desire, the Respondent is prepared to file, within a time to be

set by the [34] Commission, a full, complete and detailed supplemental report of compliance.

Respectfully submitted,

EDWIN S. ROCKEFELLER,
Wald, Harkrader & Rockefeller,
1825 Nineteenth Street, N.W.,
Washington, D.C. 20036

[35] **Affidavit of Paul DeKoning in Support of Application**

State of Oregon, County of Multnomah, SS.:

I, Paul DeKoning, being first duly sworn, say as follows:

1. I am President and General Manager of Jantzen Inc. and have full knowledge of the facts recited below.

2. In January, 1964, beginning with its 1964 Summerwear Line, in an effort to improve the administration of its cooperative advertising program, Jantzen transferred the administration of this program from its own employees to an independent agency, The Advertising Checking Bureau, in San Francisco, California. A further factor motivating this change in administration was that The Advertising Checking Bureau could serve as a buffer against pressures from favored treatment which are often asserted by retailers.

3. Attached to this Affidavit as Exhibit 1 is a copy of the 1964 Jantzen Sportswear Cooperative Advertising Program which was in effect beginning with Jantzen's 1964 Summerwear Line. A copy of this Program was mailed to each Jantzen sportswear account in November, 1963.

4. After that program had been in effect for approximately seven months, and without any advance notice, warning or opportunity given Jantzen to demonstrate its good faith in the matter, a copy of the Commission's Resolution and Order Directing An Investigation As To Whether Jantzen, Inc. Has Complied With Order To Cease and Desist dated July 22, 1964, was served upon Jantzen.

5. Thereafter, and independent of that action by the Commission, Jantzen made slight further modifications in its cooperative advertising program. Attached to this Affidavit as Exhibits 2 and 3 are copies of the current Jantzen Sportswear Cooperative Advertising Programs which have been in effect since September 1, 1964. A copy of the blue Program, Exhibit

2, was sent to each Jantzen Misses' and Juniors' Sportswear account in September, 1964. A copy of the pink Program, Exhibit 3, was sent to each Jantzen Men's, Students', Boys', Girls' and Teens' account at the same time.

[36] 6. On November 16, 1964, as President of Jantzen Inc., I sent an Inter-Office Memorandum to all Sportswear Sales Managers, Sales Representatives and Advertising Managers. A copy of that Memorandum is attached as Exhibit 4. This directive represents the policy of this Company: to treat all accounts on a proportionately equal basis by adhering strictly and unwaiveringly to the published cooperative advertising program.

7. Jantzen Inc. is doing everything which is reasonably within its power to assure that its executives, managers and other employees comply with the requirements of Section 2(d) of the amended Clayton Act.

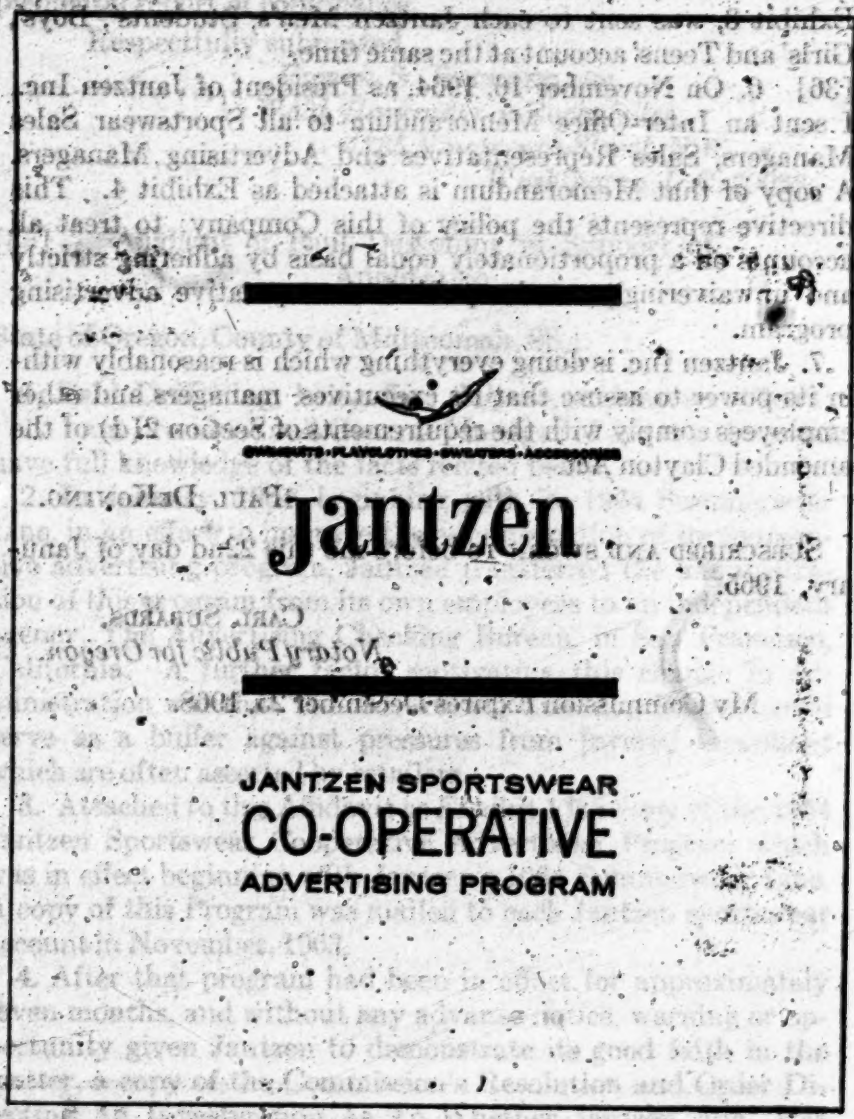
PAUL DEKONING.

SUBSCRIBED AND SWORN TO before me this 22nd day of January, 1965.

CARL SUBARDS,
Notary Public for Oregon.

My Commission Expires December 25, 1968.

[37] **Exhibit "1" to Affidavit**



co-operative advertising program for Jantzen sportswear

MEN'S, BOYS', MISSES', JUNIOR', GIRLS', PRETEENS', AND ACCESSORIES)

In drawing up the Co-operative Advertising Plan for Jantzen Sportswear, simplicity has been a prime consideration. The program becomes effective with the 1964 ruisewear and spring lines.

The purpose of the plan is to enable our retailers to identify themselves with the over-all Jantzen advertising program and to direct the force of it to the store.

The plan is available to all regular Jantzen accounts and newspaper advertising is not based on volume of purchases.

To qualify under this plan an advertisement must:

1. Feature Jantzen products exclusively.

2. Prominently display the Jantzen name or logotype in the heading or body copy in at least 12 point type.

3. Be ⅛ page in size or multiples thereof with a minimum of ⅛ page. (In tabloids the minimum size is ½ page.)

Stores may run ads of ⅛ page, ¼ page, ½ page, ¾ page or full page and be compensated on the following basis:

Less than ⅛ page . . . . No compensation

⅛ to ¼ page . . . . . ⅛ page compensation rate

¼ to ½ page . . . . . ¼ page compensation rate

½ to ¾ page . . . . . ½ page compensation rate

¾ to full page . . . . . ¾ page compensation rate

Full page . . . . . Full page compensation rate

(See compensation rates top right)

4. Appear in audited net paid circulation newspapers.

5. Feature only current season, first quality merchandise bearing the Jantzen label.

The rate of compensation will be based entirely on the circulation of the newspaper in which the advertisement is run. An average rate of payment per thousand circulation has been established for all daily and Sunday newspapers in the United States, divided into four circulation groups.

JANTZEN COMPENSATION RATE PER 1,000 CIRCULATION					
GROUP	CIRCULATION	¼ PAGE (Full Page Through)	½ PAGE (Half Page Spread)	¾ PAGE	FULL PAGE
1.	200,000 and over	$ .37½ per M	$ .75 per M	$1.12½ per M	$1.50 per M
2.	100,000-199,999	$ .50 per M	$1.00 per M	$1.50 per M	$2.00 per M
3.	25,000- 99,999	$ .75 per M	$1.50 per M	$2.25 per M	$3.00 per M
4.	Under 25,000	$1.00 per M	$2.00 per M	$3.00 per M	$4.00 per M

Examples: 250,000 (circulation) × $.37½ per thousand (¼ page) = $93.75 compensation
12,000 (circulation) × $2.00 per thousand (½ page) = $24.00 compensation

THE RATES ARE AVERAGED FOR ALL NEWSPAPERS IN A CIRCULATION GROUP AND CANNOT BE VARIED IN RELATION TO ACTUAL SPACE COST IN ANY SPECIFIED NEWSPAPER. NO ADDITIONAL COMPENSATION WILL BE ALLOWED FOR COLOR ADS.

Ads on cruisewear and spring lines may be run at any time after delivery of the lines but not beyond the 3rd of the following July. Ads on fall and holiday lines may be run at any time after delivery of the lines but not beyond the 24th of the following December. Ads may be run without prior notice or approval.

To collect for newspaper advertising you need only send two full page tear sheets of the ad within 60 days after publication to:

Jantzen Promotion
c/o The Advertising Checking Bureau, Inc.
P. O. Box 3419, Rincon Annex
San Francisco 19, California

If the advertisement meets the specified requirements, a check for the exact amount, determined by the circulation rate table, will be sent by return mail by the Advertising Checking Bureau, Inc. It is not necessary to send invoices.

ADVERTISING CLAIMS ARE NOT TO BE DEDUCTED FROM JANTZEN ACCOUNTS PAYABLE. DO NOT SEND INVOICE OR CLAIM TO JANTZEN. Claims can only be accepted and processed by The Advertising Checking Bureau. Claims for advertisements cannot be accepted if any one of the listed requirements is not met. This offer is subject to change or cancellation upon 15 days written notification.

Any request for an exception to this program will be submitted to the Federal Trade Commission for its approval.

OUTDOOR POSTERS, RADIO, TELEVISION, & CATALOGS

In instances where stores use any or all of these media, Jantzen will pay 50% of the actual cost. However, all of these items taken together shall not exceed 2% of the account's purchases for the season. Accounts which wish to use any of these media must submit their plans to Advertising Dept., Jantzen Inc., P. O. Box 3001, Portland, Oregon 97208, for prior approval.

JANTZEN

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES ONLY:

MISSES', JUNIORS' AND RELATED ACCESSORIES

[41] Exhibit "2" Affidavit

Jantzen

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES **ONLY:**

MISSES', JUNIORS', AND RELATED ACCESSORIES

[42]

co-operative advertising program for Jantzen sportswear

(MISSES', JUNIORS', AND RELATED ACCESSORIES ONLY)

In drawing up this revision of the Co-operative Advertising Plan for Jantzen sportswear, simplicity and flexibility have continued as prime considerations. This plan replaces the one issued November 1, 1963 and becomes effective September 1, 1964.

The purpose of the plan is to enable our retailers to identify themselves with the over-all Jantzen advertising program and to direct the force of it to the store.

The plan is available to all regular Jantzen accounts and newspaper advertising is not based on volume of purchases.

To qualify under this plan an advertisement must:

1. Feature Jantzen products exclusively.
2. Prominently display the Jantzen logotype in 30-pt. type size or larger or in a type size not smaller than the largest type size used for the store name in the advertisement if the store name is less than 30-pt. type in size.
3. Be not less than ¼ page in size. (In tabloids the minimum size is ½ page.)

Stores may run ads of ¼ page, ½ page, ¾ page or full page and be compensated on the following basis:

Less than ¼ page .....No compensation
¼ to ½ page .....¼ page compensation rate
½ to ¾ page .....½ page compensation rate
¾ to ⅞ page .....¾ page compensation rate
⅞ page to full page ...Full page compensation rate

4. Appear in A.C.B. daily and Sunday newspapers. (Consideration will be given to other media which do not meet this requirement but prior approval must be obtained.)
5. Feature only current season, first quality merchandise bearing the Jantzen label. Jantzen will not participate in the cost of ads for close-outs, discontinued merchandise, seconds or irregulars.

The rate of compensation will be based entirely on the circulation of the newspaper in which the advertisement is run. An average rate of payment per thousand circulation has been established for all daily and Sunday newspapers in the United States, divided into four circulation groups.

(see compensation rates top right)

[43]

[42]

JANTZEN COMPENSATION RATE PER 1,000 CIRCULATION					
GROUP	CIRCULATION	¼ PAGE (½ Page Tabloid)	½ PAGE (Full Page Tabloid)	¾ PAGE	¾ Page to FULL PAGE
1.	200,000 and over	$ .37½ per M	$ .75 per M	$1.12½ per M	$1.50 per M
2.	100,000 - 199,999	$ .50 per M	$1.00 per M	$1.50 per M	$2.00 per M
3.	25,000 - 99,999	$ .75 per M	$1.50 per M	$2.25 per M	$3.00 per M
4.	Under 25,000	$1.00 per M	$2.00 per M	$3.00 per M	$4.00 per M

Examples: 200,000 (circulation) x $.37½ per thousand (¼ page) = $93.75 compensation
12,000 (circulation) x $2.00 per thousand (½ page) = $24.00 compensation

The rates are averaged for all newspapers in a circulation group and cannot be varied in relation to actual space cost in any specified newspaper.

COLOR ADS

Where color is used the above rates of compensation will be increased by an additional amount equal to 50% of the actual color surcharge made by the newspaper.

HOW TO COLLECT FOR ADS

To collect for newspaper advertising you need only send two full page tear sheets of the ad within 30 days after publication to:

The Advertising Checking Bureau, Inc.
Jantzen Section
P. O. Box 3419, Rincon Annex
San Francisco 19, California

If the advertisement meets the specified requirements, a check for the exact amount, determined by the circulation rate table, will be sent by return mail by the Advertising Checking Bureau, Inc. It is not necessary to send invoices.

Advertising claims are not to be deducted from Jantzen accounts payable. Do not send bookkeeping claims to Jantzen. Claims can only be accepted and processed by the Advertising Checking Bureau. Claims for advertisements cannot be accepted if any one of the listed requirements is not met.

OUTDOOR POSTERS, RADIO, TELEVISION AND CATALOGS

In instances where stores use any or all of these media, Jantzen will pay 50% of the actual cost. However, all of these items taken together shall not exceed 2% of the account's net purchases for the season. Accounts which wish to use any of these media must submit their plans to Advertising Dept., Jantzen Inc., P. O. Box 3001, Portland, Oregon 97208, for prior approval.

Any request for an exception to this program would have to be submitted to the Federal Trade Commission for its approval.

This program is subject to change or cancellation upon 15 days written notification.

JANTZEN

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES ONLY:

MEN'S, STUDENTS', BOYS',

GIRLS', TEENS' AND RELATED ACCESSORIES

Jantzen

JANTZEN SPORTSWEAR

CO-OPERATIVE

ADVERTISING PROGRAM

FOR THE FOLLOWING LINES **ONLY:**

MEN'S, STUDENTS', BOYS',
GIRLS', TEENS' AND RELATED ACCESSORIES

co-operative advertising program for Jantzen sportswear

(MEN'S, STUDENTS', BOYS', GIRLS', TEENS', AND RELATED ACCESSORIES ONLY)

In drawing up this revision of the Co-operative Advertising Plan for Jantzen sportswear, simplicity and flexibility have continued as prime considerations. This plan replaces the one issued November 1, 1963 and becomes effective September 1, 1964.

The purpose of the plan is to enable our retailers to identify themselves with the over-all Jantzen advertising program and to direct the force of it to the store.

The plan is available to all regular Jantzen accounts and newspaper advertising is not based on volume of purchases.

To qualify under this plan an advertisement must:

1. Feature Jantzen products exclusively.
2. Prominently display the Jantzen logotype in 30-pt. type size or larger or in a type size not smaller than the largest type size used for the store name in the advertisement if the store name is less than 30-pt. type in size.
3. Be not less than ¼ page in size. (In tabloids the minimum size is ¼ page.)

Stores may run ads of ¼ page, ¼ page, ½ page, ¾ page or full page and be compensated on the following basis:

Less than ¼ page ..... No compensation
¼ to ¼ page .... ¼ page compensation rate
¼ to ½ page .... ¼ page compensation rate
½ to ¾ page .... ½ page compensation rate
¾ to ⅞ page .... ¾ page compensation rate
⅞ to full page .... Full page compensation rate

4. Appear in A.C.B. daily and Sunday newspapers. (Consideration will be given to other media which do not meet this requirement but prior approval must be obtained.)
5. Feature only current season, first quality merchandise bearing the Jantzen label. Jantzen will not participate in the cost of ads for close-outs, discontinued merchandise, seconds or irregulars.

The rate of compensation will be based entirely on the circulation of the newspaper in which the advertisement is run. An average rate of payment per thousand circulation has been established for all daily and Sunday newspapers in the United States, divided into four circulation groups.

(see compensation rates top right)

JANTZEN COMPENSATION RATE PER 1,000 CIRCULATION						
GROUP	CIRCULATION	⅛ PAGE (¼ Page Tabloid)	¼ PAGE (½ Page Tabloid)	½ PAGE (Full Page Tabloid)	¾ PAGE	¾ PAGE to FULL PAGE
1.	200,000 and over	$ .19 per M	$ .37½ per M	$ .75 per M	$1.12½ per M	$1.50 per M
2.	100,000 - 199,999	$ .25 per M	$ .50 per M	$1.00 per M	$1.50 per M	$2.00 per M
3.	25,000 - 99,999	$ .37½ per M	$ .75 per M	$1.50 per M	$2.25 per M	$3.00 per M
4.	Under 25,000	$ .50 per M	$1.00 per M	$2.00 per M	$3.00 per M	$4.00 per M

Examples: 250,000 (circulation) × $.37½ per thousand (¼ page) = $93.75 compensation
12,000 (circulation) × $2.00 per thousand (½ page) = $[illegible] compensation.

The rates are averaged for all newspapers in a circulation group and cannot be varied in relation to actual space cost in any specified newspaper.

COLOR ADS

Where color is used the above rates of compensation will be increased by an additional amount equal to 50% of the actual color surcharge made by the newspaper.

HOW TO COLLECT FOR ADS

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The Advertising Checking Bureau, Inc.
Jantzen section
P. O. Box 3419, Rincon Annex
San Francisco 19, California

If the advertisement meets the specified requirements, a check for the exact amount, determined by the circulation rate table, will be sent by return mail by the Advertising Checking Bureau, Inc. It is not necessary to send invoices.

Advertising claims are not to be deducted from Jantzen accounts payable. Do not send invoices or claims to Jantzen. Claims can only be accepted and processed by the Advertising Checking Bureau. Claims for advertisements cannot be accepted if any one of the listed requirements is not met.

RADIO, TELEVISION AND CATALOGS

In instances where stores use any or all of these media, Jantzen will pay 50% of the actual cost. However, all of these items taken together shall not exceed 1% of the account's net purchases for the season. Accounts which wish to use any of these media must submit their plans to Advertising Dept., Jantzen Inc., P. O. Box 3001, Portland, Oregon 97208, for prior approval.

Any request for an exception to this program would have to be submitted to the Federal Trade Commission for its approval.

This program is subject to change or cancellation upon 15 days written notification.

[48] Exhibit "4" to Affidavit [49]

[redacted]

Advertising Allowance to Retail Accounts

As many of you know, in 1959 we each placed a Cease & Desist Order by the Federal Trade Commission. This Order prohibited us from granting any special favors to our accounts through payments for cooperative advertising. In 1960 we each placed a Cease & Desist Order by the Federal Trade Commission. This Order prohibited us from granting any special favors to our accounts through payments for cooperative advertising.

To the Spring 1963 through 1963, our Cooperative Advertising program allowed stores to receive up to 3% of purchases for newspaper advertising. As a result of a recent FTC investigation of our accounts, we have learned that in some cases we actually exceeded this allowance. We are now faced with a situation where may further violations may cost Jantzen up to $5,000 apiece - possibly deductible money.

You can now cooperative program is designed to treat all retailers fairly, and our legal advisors tell us it is within the law. In a further effort to reduce pressures from certain of our accounts, it is being administered through ACP rather than directly by our Advertising Department. AS MUST STAY WITHIN STRICT

may requests by accounts, by salesmen or by anyone else for a payment which does not fall directly within some published program MUST BE REFUSED. This includes depletion allowances for store window space, advertising for department openings, special store promotions or the like.

Please note this place you at a disadvantage with liberal allowance given by competitors but until these practices are curbed we must rely on selling ability and value plus allowance.

We shall hold accountable each person who deviates from the principles outlined above. We cannot continue to be threatened with charges of violating Federal laws. No one and we must be jeopardizing business even if it may occasionally mean losing "Ma" to a large account.

[redacted]

All Customer Sales Representatives

Paul DeKoning

Advertising Allowances to Retail Accounts

As many of you know, in 1959 we were placed under a Cease & Desist Order by the Federal Trade Commission. This Order prohibited us from granting any special favors to our accounts through payments for cooperative advertising.

In the years 1960 through 1963, our Cooperative Advertising program allowed stores to receive up to 3% of purchases for newspaper advertising. As a result of a recent FTC investigation of our records, we have learned that in some cases we actually exceeded this allowance. We are now faced with a situation where any further violations may cost Jantzen up to $5,000 apiece - non-tax deductible money.

Our new cooperative program is designed to treat all retailers fairly, and our legal advisors tell us it is within the law. In a further effort to reduce pressures from certain of our accounts, it is being administered through ACB rather than directly by our Advertising Department. WE MUST STAY WITHIN THAT PROGRAM.

Any requests by accounts, by salesmen or by anyone else for a payment which does not fall directly within that published program MUST BE REFUSED. This includes requests for payments for store window space, advertising for new store openings, special store promotions or the like.

We realize this may place you at a disadvantage with liberal allowances given by competitors but until these practices are curbed we must rely on selling something more than allowances.

We shall hold accountable each person who deviates from the principles outlined above. We cannot continue to be threatened with charges of violating Federal laws. We can and we must be law-abiding businessmen even if it may occasionally mean saying "No" to a large account.

cc

Copies to: Chuck Pancher
Don Smith
Bill O'Brien
Bob Wirtz
Bob Ludeman
Gregg Millett
Did Condo
John Hamilton
Don Gordon
Bruce Sturm
All Sportswear Sales Representatives

[50] Before the Federal Trade Commission

[Title omitted]

Answer to Application of Respondent for Disposition of Investigation Under Section 1.21—Dated January 29, 1965

Comes now counsel for the Commission in answer to respondent's application, filed pursuant to Section 1.21 of the Commission's General Procedures on January 28, 1965, for the informal disposition of the investigation directed by the Commission's Resolution and Order of July 22, 1964. It is submitted that there is no justification or basis for granting the relief prayed for in the said application, and the Commission is respectfully requested to certify to the United States Court of Appeals for the Ninth Circuit, the Commission's report upon its investigation of alleged violations of the order herein, and to file the attached, proposed "Application for Affirmance and Enforcement of an Order of the Federal Trade Commission."

As support for Commission's denial of said application and its certification to the Court for affirmance and enforcement of the order herein, counsel for the Commission offer the following statement.

[51] 1. Respondent's request for the informal disposition of this matter by "filing without further action" the "Report of the hearing examiner dated January 14, 1965" is inappropriately sought under the informal enforcement procedures of Section 1.21 of the Commission's General Procedures. The voluntary compliance provisions of Section 1.21 deal with the nonadjudicatory disposition of prospective Commission actions and not the settlement of a respondent's non-compliance with an existing Commission order. But even if measured by Section 1.21's prior record and good faith standards, respondent's repeated violations of the Commission's 1959 order to cease and desist (as modified, March 28, 1960) would not entitle respondent to consideration under this Section's informal disposition provisions.

Steps reportedly taken by respondent (see Affidavit and four exhibits attached to respondent's application) more than four and one-half years after issuance of the Docket 7247 order to insure compliance with that order, were not an issue in the investigative hearing herein, and are irrelevant.

2. The non-public investigational hearing ordered pursuant to Commission resolution and order of July 22, 1964, conclusively established, as shown by the hearing examiner's "Report and Certification to the Commission of [52] Investigational Hearing," filed January 14, 1965, that "respondent Jantzen, Inc., in the course of its business in commerce, has admittedly failed to comply with the provisions of the order to cease and desist."

3. The "difficult questions" suggested in respondent's application and the reservations by respondent in the investigational hearing record as to (a) the effectiveness of the Commission's original, modified order, and (b) any method provided in law with the enforcement of such order, are not supported by the law established for the enforcement of pre-1959 Clayton Act orders. *F.T.C. v. Washington Fish and Oyster Co., Inc.*, 271 F. 2d 39 (9th Cir. 1959); *F.T.C. v. Standard Brands, Inc.*, 189 F. 2d 510 (2nd Cir. 1951); *Nash-Finch v. F.T.C., et al.*, 233 F. Supp. 910 (D.C. Minn., 1964) and *F.T.C. v. Pacific Gamble Robinson Company* (Docket 5819) 9th Cir. No. 18260, decree entered November 28, 1962.

As set forth above, respondent's application for the informal disposition of the investigational hearing report showing respondent's violations of the Docket 7247 order is without justification or basis and should be denied. It is also respectfully submitted that the appropriate disposition of the report of respondent's order violations is for the Commission to authorize the Bureau of Restraint of Trade to file, under the general supervision of the Appellate [53] Division of the Office of the General Counsel, in the Court the Commission's certification and the attached application for affirmance and enforcement of the Docket 7247 order. The Commission is also requested to direct that its resolution and order of July 22, 1964, the reports of the hearing examiner and the Commission, and the record of this non-public investigational hearing be made part of the public record herein to permit such documents supporting Commission certification and application for order enforcement to

be filed as part of the public record in the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

EDWARD G. GRIFFIN,
Attorney.

GERALD T. GREGORY,
Attorney.

Dated this 29th day of January 1965.

[54] [Omitted printed page 105–A]

[55–59]

[60] Before Federal Trade Commission

[Title omitted]

Order Denying Respondent's Request for Informal Disposition—April 9, 1965

This matter is before the Commission on the hearing examiner's "Report and Certification of Record of Investigational Hearing", filed January 14, 1965. Respondent filed its application on January 28, 1965, requesting informal disposition of this proceeding under § 1.21 of the Rules of Practice, and Commission counsel, on February 5, 1965, filed their answer in opposition thereto.

The Commission, upon consideration of respondent's application and Commission counsel's answer, has determined that this matter is not suitable for disposition under § 1.21 of the Rules of Practice. Further, the Commission has reviewed respondent's contentions, first, that the consent order to cease and desist of January 16, 1959, and modified March 26, 1959, is invalid, and, second, that there is no statutory method for enforcement of Clayton Act orders issued prior to July 23, 1959. These contentions are without merit. Accordingly,

It is ordered that respondent's "Application For Disposition Of Investigation Under Section 1.21" be, and it hereby is, denied.

By the Commission.

JOSEPH W. SHEA,
Secretary.

Issued: April 9, 1965.

[61] Before Federal Trade Commission

Commissioners: PAUL RAND DIXON, *Chairman;* PHILIP ELMAN, EVERETTE MACINTYRE, JOHN R. REILLY, MARY GARDINER JONES.

Docket No. 7247

In the matter of

JANTZEN, INC., A CORPORATION

Report of the Federal Trade Commission Upon Its Investigation of Alleged Violations of Its Order to Cease and Desist—April 12, 1965

THE PROCEEDINGS

On July 22, 1964, the Commission having reason to believe that Jantzen, Inc., may have violated the provisions of the order to cease and desist issued herein on January 16, 1959, and modified on March 26, 1959, directed that an investigational hearing be conducted pursuant to § 1.35 and related rules of the Commission's Rules of Practice to ascertain the extent to which such violations may have occurred. A hearing examiner of the Commission was duly designated to preside at hearings to be conducted for that purpose and it was directed that he, in lieu of rendering an initial decision upon completion of the hearing, certify the record to the Commission, together with his report upon the investigation.

Pursuant to and in accordance with the foregoing, a hearing was set by the hearing examiner for November 30, 1964, in Portland, Oregon, for the purpose of taking testimony in evidence concerning the nature and extent of compliance by Jantzen, Inc., with the said order to cease and desist. Prior to said hearing a prehearing conference was ordered herein for Washington, D.C., on November 23, 1964. During the course of this conference a stipulation signed by counsel for the [62] Commission and for respondent, Jantzen, Inc., and a motion, agreed upon by counsel to close the proceedings before the hearing examiner, were submitted to the hearing examiner and incorporated into the record. On November 23, 1964, the hearing examiner issued his order, as requested by counsel for both respondent and the Commission, cancelling the investigational hearing set for Portland, Oregon, quashing the subpoenas directed to the respondent's officials, excusing their appearance

and closing the record in this proceeding. On January 14, 1965, the hearing examiner's "Report and Certification to the Commission of Record of Investigational Hearing" was duly recorded and filed in the office of the Commission. The Commission having duly considered the report filed by the hearing examiner and the record herein and being now fully advised in the premises, and having accepted the said stipulation entered into by counsel for the respondent and the Commission, makes this its report upon the investigation of the alleged violations of the order to cease and desist.

The Order

The order to cease and desist which issued on January 16, 1959, and which was amended on March 26, 1959, is as follows:

> It is ordered, that respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Report on the Facts

As shown by the stipulation submitted during the prehearing conference of November 23, 1964, respondent acknowledges and admits the following facts:

[63] 1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as

"commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer, Loveman's, 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on [64] proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

CONCLUSION

It is our conclusion, after giving due consideration to the acts and practices of the respondent as evidenced by the admissions in the said stipulation, that the respondent, Jantzen, Inc., has paid advertising or promotional allowances to certain customers as compensation or in consideration for advertising or promotional services furnished by or through such customers in connection with the offering for sale, sale or distribution of respond-

ent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the favored customers in direct violation of the Commission's order to cease and desist issued January 16, 1959, and amended March 26, 1959.

By the Commission.

JOSEPH W. SHEA, *Secretary.*

ISSUED: APRIL 12, 1965.

[65] **Before the Federal Trade Commission**

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Transcript of Proceedings Before Hearing Examiner

November 23, 1964

Met, pursuant to notice, at 10:30 a.m. in Room 7316, 1101 Building, 11th Street & Pennsylvania Avenue, N.W., Washington, D.C., Monday, November 23, 1964.

Before: EDSON P. SCHRUP, Hearing Examiner

Appearances:

Edward G. Gruis, Esq. and *Gerald T. Gregory, Esq.*, Attorneys on behalf of the Federal Trade Commission.

Edwin S. Rockefeller, Esq., (Wald, Harkrader & Rockefeller) 1225 19th Street, N.W., Washington, D.C., Attorney on behalf of Respondent.

[66] PROCEEDINGS

Hearing Examiner SCHRUP. The hearing will be in order. This is a prehearing conference in the matter of Jantzen, Inc., Docket No. 7247, set by order of the hearing examiner for today, November 23, 1964, by agreement of counsel.

COLLOQUY BETWEEN COUNSEL AND HEARING EXAMINER

Mr. Gruis, do you think it might be well for you to make a preliminary statement of what has transpired?

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. Proceed.

Mr. GRUIS. The Commission, by order and resolution dated July 22, 1964 directed that an investigational hearing be held to determine whether or not respondent in this particular proceeding was complying with the provisions of the Commission's order in Commission's cease and desist order in Docket No. 7247, that order dealing with Section 2(d) of the Robinson-Patman Act and the Clayton Act prohibiting the payment, that is, prohibiting the discriminatory payments of promotional allowances to only certain favored customers. The hearing examiner called informal meetings to determine the procedure to be followed in this hearing; and thereafter issued subpoenas on behalf of the Federal Trade Commission requiring two parties to appear and testify in connection with this proceeding.

Thereafter counsel for the respondent met with counsel for the Commission and entered into a stipulation which [67] admitted the identity of the respondent in this proceeding and that it has on several occasions violated provisions of the said cease and desist order in this matter.

This stipulation is signed by counsel on the 17th of November 1964. As a result of this stipulation it now appears unnecessary for a return to be made to the subpoenaes issued in this matter, and counsel for both parties agree that such subpoenaes can be quashed by the hearing examiner.

Moreover, inasmuch as this hearing was directed by Commission's order and resolution, directing that the hearing examiner take evidence and report on facts as to whether or not its order in this matter has been violated, and with such admissions in the stipulation it now appears needless to continue this hearing for the purposes set forth in the Commission's order.

I am prepared at this time to offer to the hearing examiner a copy of the said stipulations, as well as the motion to close the proceedings in this matter.

Hearing Examiner SCHRUP. Do you have anything to say?

Mr. ROCKEFELLER. No, sir. We agree to the stipulation. I would like to say something before we close today, but I simply

confirm what Mr. Gruis has said about our position; that is, we have entered into the stipulation and what he said we agree to.

Hearing Examiner SCHRUP. All right, Mr. Rockefeller.

[68] Now, as I would understand it, before we go to the stipulations, I had heretofore set a hearing for Portland, Oregon to commence on November 30, at which the advertising manager of Jantzen, Inc. was subpoenaed to testify and also a subpoena ducus tecum directed to the vice president of Jantzen, Inc. It is my understanding that you want both of these subpoenaes quashed?

Mr. GRUIS. That is correct, Mr. Examiner.

Hearing Examiner SCHRUP. And the hearings that were set and to commence on November 30 in the Portland, Oregon shall also be cancelled?

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. Then your entire record as far as evidence is concerned in this matter will be presented by the stipulation that you are now offering?

Mr. GRUIS. That is correct, sir.

Hearing Examiner SCHRUP. And you want to make that stipulation as an exhibit?

Mr. GRUIS. I would like to offer it to the Examiner at this time.

Hearing Examiner SCHRUP. And be made a part of the record of this proceeding. This will be Commission's Exhibit No. 1.

Mr. GRUIS. It is just Exhibit No. 1.

Hearing Examiner SCHRUP. How many pages have you?

[69] Mr. GRUIS. I think it has four pages.

Hearing Examiner SCHRUP. This will be Commission's Exhibit 1–A, 1–B, 1–C and 1–D, being a document entitled "Stipulation in the Matter of Jantzen, Inc., a Corporation, Docket No. 7247" consisting of four numbered pages signed by Mr. Rockefeller as attorney for the respondent and by Mr. Gruis and Mr. Gregory as attorneys for the Federal Trade Commission. There being no objection, by agreement of counsel, the stipulation is entered into evidence as Commission's Exhibit No. 1–A, 1–B, 1–C and 1–D.

(The document referred to was marked for identification Commission's Exhibit No. 1-A, 1-B, 1-C, and 1-D and was received in evidence.)

Mr. GRUIS. And is also made a part of the record?

Hearing Examiner SCHRUP. That is a part of the record. That will accompany the record which will be certified by me to the Commission.

Mr. GRUIS. Very well. I have also at this time, unless counsel for the respondent has some additional remarks to make, a motion to close the proceedings in this particular matter.

Hearing Examiner SCHRUP. You can handle it any way that you see fit, Mr. Rockefeller, do you want Mr. Gruis to make his motion and then you either agree or disagree with it, and then if you have a statement to make for the record I will [70] listen to you.

Mr. ROCKEFELLER. We are going to agree to the motion. My suggestion would be that Mr. Gruis go right ahead.

Hearing Examiner SCHRUP. All right.

Mr. GRUIS. At this time, Mr. Examiner, a quash of the motion to close the proceedings in this particular matter, inasmuch as our stipulation is already admitted as Commission Exhibit No. 1, admits the facts which would be established by this hearing of violations in Docket No. 7247, in that order, and also there is consent by the parties herein so far as such admission of facts is sufficient to form the full record in this proceeding for your certification forward to have these hearings closed.

Hearing Examiner SCHRUP. The motion will be filed as part of the pleadings in the case?

Mr. GRUIS. Yes, sir. I will give you a copy now, sir.

Hearing Examiner SCHRUP. Do you agree to this motion?

Mr. ROCKEFELLER. We have no objection to the motion.

Hearing Examiner SCHRUP. This motion of two pages entitled "In the Matter of Antzen, Inc., a corporation, Docket No. 7247, Motion to Close Proceedings before Hearing Examiner," will be filed as part of the pleadings in this case and for the record. The motion will be granted.

Mr. GRUIS. I have one final set of papers, insofar [71] as this is concerned, and it is a report proposed by Commission counsel of the investigational hearing and a certification of the

record to the Commission that we have prepared for your consideration, sir.

Hearing Examiner SCHRUP. You can submit that to me. Have you submitted a copy to Mr. Rockefeller?

Mr. GRUIS. Not yet, no, sir.

Hearing Examiner SCHRUP. I will take that. Give a copy to Mr. Rockefeller. I will give it consideration.

Mr. GRUIS. At this time, sir, ——.

Hearing Examiner SCHRUP. You can hand it to me, please. Let us go off the record.

(Discussion off the record.)

Hearing Examiner SCHRUP. On the record.

In order to avoid any problems about this motion that has been submitted and granted by the Hearing Examiner I will direct the reporter to copy it into the record at this point.

(The document entitled "Motion to Close Proceedings before Hearing Examiner" follows:)

United States of America Before the
Federal Trade Commission

[72]

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

Motion to Close Proceedings

BEFORE HEARING EXAMINER

Counsel for the Federal Trade Commission respectfully request that the non-public investigational hearing herein set for November 30, 1964, in Portland, Oregon, be cancelled, and all further proceedings before the Hearing Examiner in this matter be closed. The motion is made pursuant to the attached executed copy of a "Stipulation" by counsel for the Respondent and the Commission, respectively, which:

1. Admits to facts to be established by the hearing which show violations of the Docket No. 7247 order; and

2. Consents to having all further hearings before the Hearing Examiner in this proceeding closed.

For these reasons, the purpose for the investigational hearing on this matter has become moot, and the request is made hereby, with the concurrence of counsel for the respondent, that all further proceedings before the Hearing Examiner be closed, and the said stipulation together with the Examiner's report be certified to the Commission as compliance with its resolution and order of July 22, 1964, directing this non-public [73] investigational hearing.

Dated this ___ day of ____ 1964.

Respectfully submitted,

EDWARD G. GRUIS,
Attorney,
GERALD T. GREGORY
Attorney,
Federal Trade Commission.

(The document entitled "Stipulation" follows:)

United States of America
Before Federal Trade Commission

[72]

Docket No. 7247

In the Matter of

JANTZEN, INC., A CORPORATION

To: Hearing Examiner ELDON F. SCHRUP:

STIPULATION

Pursuant to the Resolution and Order of the Federal Trade Commission (Commission), dated July 22, 1964, directing an investigational hearing to determine whether or not Jantzen, Inc. (Respondent), has complied with provisions of the Commission's order to cease and desist, issued on January 16, 1959, and modified on March 26, 1959, and in connection with the Hearing Examiner's Order herein, dated October 12, 1964, setting the time and place to commence the investigational hearing, and the subpoenas issued herein by the Hearing Examiner [74] to Donald E. Kennedy, Vice President of Jantzen, Inc., and Bruce Sturm, Advertising Manager for Jantzen, Inc.,

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the following is a true statement of facts:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada, with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as "commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer, Loveman's, 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savey Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in [75] violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

IT IS HEREBY FURTHER STIPULATED AND AGREED, by and between counsel for the Commission and counsel for the Respondent, subject to approval of the Hearing Examiner, that the above admissions of order violations by respondent make unnecessary:

1. Compliance with the said subpoenas issued herein and counsel for the Commission and counsel for the Respondent agree and consent to having said subpoenas quashed.

2. Continuation of hearings herein to determine whether or not respondent has complied with the said order to cease and desist, and counsel for the Commission and counsel [76] for the Respondent agree and consent to having all further hearings before the Hearing Examiner in this proceeding closed.

Signed this 17th day of November 1964.

JANTZEN, INC.
/s/ Edwin S. Rockefeller
EDWIN S. ROCKEFELLER, Esquire,
Wald, Harkrader & Rockefeller,
Attorneys for Respondent.

/s/ Edward G. Gruis
EDWARD G. GRUIS,
Attorney,
Federal Trade Commission.

/s/ Gerald T. Gregory,
GERALD T. GREGORY,
Attorney,
Federal Trade Commission.

Hearing Examiner SCHROP. Is there anything further?

Mr. GRUIS. I have nothing further at this time.

Hearing Examiner SCHROP. I will hear from you, Mr. Rockefeller.

STATEMENT BY MR. ROCKEFELLER

Mr. ROCKEFELLER. Thank you, sir. Counsel for Jantzen, Inc. that I am, we do appreciate an opportunity to make a statement for the record at this time, so that our agreement to the stipulation with counsel for the Commission and ourselves in a sense an agreement to the motion on the entire proceeding here will not be misunderstood. As will be noted [77] from the stipulation itself we make the admissions contained in the stipulation for the limited purpose of use in this investigational proceeding only, and our understanding is that it will be used for that purpose only. We have agreed to this stipulation of fact (indeed it was upon our initiative that the stipulation was developed) in order to

spare both Jantzen and the government the unnecessary expenses of transcontinental travel and hearings in several cities which might have been unnecessary.

In order to avoid, though, any misunderstanding by Commission counsel or by the Hearing Examiner or by the Commission itself, we do want to say that from our agreement to this stipulation it should not be inferred that Jantzen concedes any legal authority to the Commission in this proceeding. To be more specific, Jantzen does not concede either (1) that what the Commission has designated as an order to cease and desist of January 11, 1959 as modified March 26, 1959, was ever an effective order to cease and desist as provided by the law nor (2) that if the so-called "order" was ever in fact a valid one provided by law, that there is at this time any method provided in law for the enforcement of such "order."

While I believe that we are all in agreement here that by reason of the Commission's conception of this proceeding, as is suggested by the Commission's resolution and order of July 22, 1964, we are agreed I believe that the Hearing [illegible]8] Examiner need not be burdened with questions of this sort, but by the terms of the Commission's direction, shall merely conduct a factual investigation and certify the record of such investigation to the Commission; nevertheless, it may be helpful to state briefly for this record what we mean by each of these questions which I wish to leave open, and I would like to do so briefly at this time.

Hearing Examiner SCHRUP. You may proceed.

Mr. ROCKEFELLER. Thank you, sir.

First of all there is a serious question whether the Commission's so-called "order" to cease and desist issued January 11, 1959 and later modified on March 26, 1959 was ever of any legal effect. The Clayton Act provides specific procedure for the issuance by the Commission of orders to cease and desist. As section 11(b) of the Act provides for complaint and hearing. It provides further that "if upon such hearing the Commission * * * shall be of the opinion that any of the provisions of (Sections 2, 3, 7 and 8) have been are being violated it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such a person an order requiring such person to cease and desist from such violations."

The Commission did not follow such procedure in this case. It made no report in writing and stating its findings as to the facts. Instead the Commission apparently relied on [79] Respondent's waiver of the procedural steps required by the statute. But neither this respondent nor any respondent can by consent confer on the Federal Trade Commission any jurisdiction which the Congress has not granted to it. Respondent could well have concluded, and in complete good faith, that aside from the question of the lawful effect of any such consent "order", the best method to dispose of the earlier proceeding was the informal one offered by the Commission's consent procedure, since what respondent sought was continuing guidance from the Commission on how to comply with the law. (Unfortunately, respondent has not received such guidance. On several occasions it has sought comments from the Commission's staff on its promotional practices, and these were refused.)

Furthermore, there are other reasons than protection of the respondent for which in any Federal Trade Commission complaint proceeding, for which the Congress provided the specific procedures contained in the statute, and for these reasons the Commission must follow the statutory steps regardless of respondent's willingness to cooperate if the Commission is to issue an enforceable order of the type provided by the statute.

Second, even if one were to conclude that the Commission's so-called "order" of 1959 was once as valid as those issued pursuant to the statute's provisions, there does not now exist any provision in law for the enforcement of such orders. [80] Until 1959 Section 11 of the Clayton Act provided an enforcement procedure which the Commission by its resolution of July 22, 1964 is apparently attempting to use here. But in 1959 Public Law 86-107 so amended the Clayton Act as to eliminate the so-called statutory authority for the maintenance of an enforcement proceeding of this sort. New review, finality and penalty provisions replaced the prior enforcement methods, but these have been expressly held to be inapplicable to orders issued before 1959, despite the Commission's own efforts to establish the contrary.

Thus, the present Section 11 of the Clayton Act provides no method for the enforcement of orders issued before 1959, and the Commission itself so recognized at the time of amendment. Further, Section 2 of Public Law 86-107 provides that the amendment shall not apply to "any proceeding initiated before

the date of the enactment of this act under the third and fourth paragraph of Section 11." Since these paragraphs refer only to the enforcement and review proceedings, the exemption does not include such matters as the Jantzen proceeding, which would be an enforcement proceeding initiated after the enactment of Public Law 86-107.

Thus, we wish simply to record here—and we appreciate your courtesy in permitting us to do so—that our position is that the order is not valid and, in any event that there is presently no legal authority for obtaining enforcement of any [81] such so-called "order."

It may also be helpful to mention the following at this time. Should the Commission conclude upon review of this record that it might be appropriate to dispose of this matter by some other means such as under Section 1.21 of the Commission's rules, rather than to force full court consideration of the difficult questions which would be presented were the Commission to seek court enforcement of the 1959 "order."

It will be noted that the last of the violations referred to in the stipulation occurred in 1962. I am informed that these violations were unintended and inadvertent. They were overpayments resulting from poor administration of Jantzen's promotional program by an incompetent clerk. Such violations have been completely eliminated and will not occur in the future.

For a number of years Jantzen has had a written plan for promotional payments which it sent to all accounts, and on which it unsuccessfully sought review and comments from the Commission's compliance staff.

In 1963 Jantzen installed an IBM system for its promotional program, and, in 1964 policing of the program was turned over to the Audit Checking Bureau. Copies of several recent written plans, including those currently in effect, are attached to an affidavit, submitted herewith, of Donald E. Kennedy, Vice President and Assistant General Manager of [82] Jantzen, Inc., which I have here. I am sorry that I did not show it to you sooner. I just got it.

COLLOQUY BETWEEN COUNSEL AND HEARING EXAMINER

Hearing Examiner SCHRUP. Do you want to take a short recess, Mr. Gruis, while you look over the document?

Mr. GRUIS. No.

Mr. ROCKEFELLER. What I would like to do, if I may, is to ask the Reporter to mark the affidavit and then we will offer it to you for this record.

Hearing Examiner SCHRUP. Is there any objection?

Mr. GRUIS. I object. I object to this extent, insofar as a running commentary of how the law evolved concerning the enforcibility of pre-1959 orders of the Commission. I do not raise any question here as to what our propriety is at this proceeding to make any determination on that, one way or another, but I do take strong exception, sir, to introducing into this record now through counsel evidence that seems to go to the heart of the stipulation entered into in good-faith between counsel for the Commission and counsel for the respondent in this particular proceeding. It was not brought to our attention at the time the stipulation was prepared that there were any other factors on the outside other than a straight-forward recognition that such violations had occurred.

For this reason I will certainly request that such commentary be stricken from the record insofar as a coloring or elaboration on the stipulation that has been offered in [83] good-faith.

Hearing Examiner SCHRUP. Is it your position—of course you have not read the stipulation, or rather you have not read the affidavit—is it your position that it contradicts the stipulation?

Mr. GRUIS. No, sir. My position at this stage is that this particular information was not before us at the time that the stipulation was entered into. That stipulation was entered into in good-faith on the assumption, sir, and with the belief that there will not be anything more offered into this record.

Hearing Examiner SCHRUP. I understand your argument, but I suggest this to you, Mr. Gruis, before we proceed further that we take a short recess and you read the affidavit to see what the content of it is.

Mr. GRUIS. Thank you, sir.

Hearing Examiner SCHRUP. We will have a short recess.

(Short recess was taken.)

Hearing Examiner SCHRUP. The hearing will be in order. We will hear from you, Mr. Gruis.

Mr. GRUIS. In the brief intermission I have had an opportunity to go over this affidavit, sir, which contains several statements purporting to be under oath, not only as to the exhibits attached and when they were put into effect, but also their

internal operations and procedures, insofar as [84] handling payments to their retail accounts, insofar as cooperative advertising ventures are concerned which of course is at the heart of this whole proceeding.

Moreover they have also raised the question that their own internal procedures have now been shifted to another agency. This was in January of 1964. And for the purpose of serving as a buffer against their industry.

They have also raised questions with respect to prior dealings with the Commission, insofar as inquiries made throughout the period after the order was issued, but prior to the time that the Commission's cease and desist resolution and order occurred.

I only suggest, sir, this, Mr. Examiner, that obviously this particular resolution and order was not issued by the Commission without any understanding whatsoever of what was happening in this industry, without attempting to dig into the details of prior investigations or prior inquiries of the respondent. That fact becomes an issue if you look at Item Not 7 in this particular affidavit.

In my judgment, sir, this particular information is irrelevant and has no place in this particular proceeding, particularly in light of the stipulation that has been entered into.

Finally we have an inter-office memorandum attached as Exhibit 5 to the affidavit dated November 16, 1964 which [85] was issued sometime after this proceeding started. And, of course, serves as a self-serving statement on how they are complying or what they are doing to comply with the order.

Again, for these reasons, sir, if counsel for the respondent is going to press on the submission of this particular affidavit, as well as insist upon reading it into the record, as to his evidentiary position or his factual position with respect to their past conduct and practices I am going to submit that we have had no opportunity either to cross-examine these people or to by documentary evidence ascertain the accuracy or the factors that have resulted in this type of conduct. If such be the case I am prone at this stage to have the stipulation withdrawn and go ahead with the subpoenas so that we can have the facts determined as a matter of record in this proceeding and not by affidavit.

Hearing Examiner Scanlon. What do you have to say to that, Mr. Rockefeller?

Mr. ROCKEFELLER. I will say this, that I apologize for not getting this into counsel's hands sooner so that he might have had an opportunity to see it. I am distressed at the suggestion whether we offer this or do not offer it or offer to prove the matters that are contained in here that it has anything to do with the stipulation. What we have been trying to do is to move this proceeding, if there is one, along and not just take time on things that are going to end up being [86] proven anyway.

In the stipulation of facts we attempted to meet what it was that counsel wanted out of hearing and we made those admissions, and they stand regardless.

What we hope to do here was simply not to rebut any of the facts contained in the stipulation. In a sense not to discuss the relationship of those facts to the Commission's order, but simply to offer supplementary information to the Commission in the nature of a compliance report, in a sense, so that the Commission can make the most intelligent judgments possible as to what to do with this record, once it gets it.

Hearing Examiner SCHRUP. You—— do I understand from your proffered document, the affidavit, that this is a description of what your efforts have been to comply and how you have formulated new business methods in that nature?

Mr. ROCKEFELLER. I think it is fair to say, and Mr. Gruis can correct me if I am wrong, that this is a very brief summary of the history of Jantzen's promotional program since the violations that are admitted in the stipulation was offered.

Hearing Examiner SCHRUP. The document is in no way a denial of the facts stated in the stipulation?

Mr. ROCKEFELLER. I do not think so. I had no notion that it would be interpreted in that fashion and we do not offer it for that purpose, of course not. We regard it as not [87] at all rebutting the stipulation. In fact and perhaps I was wrong, I intended to think of this sort of material as irrelevant in the stipulation itself and perhaps my concept was wrong. I thought that the stipulation ought to stick to those things that Commission counsel needed to show a violation, that is, several instances of violations. This what they felt or thought they needed, and I understood they thought they needed it and we were able to meet them on that.

A lot of stuff, whether it was inadvertant or what-not, has gone on since or how their present plan is administered, I

thought was really such as did not belong in the stipulation. But I did not see any reason why we should not offer it in the most efficient, helpful fashion at this time or at some time. It seemed to me that this is the time to do it. I do not really want to get in a firmed up adversary posture at this point in this proceeding.

If counsel has a lot of doubt about the stipulation or something, then I just do not know myself. What we could do, I guess—I am not sure where we are procedurally—we could offer this to you in this conference. I suppose we could do that—something that we would like you to see, and he objects to seeing it. If that is where we stand I suppose that if he is going to object, you know, it would be like a formal proceeding, why, I could simply turn around and say that we will just offer to prove all of these things, I offer [88] to prove the following, and I will just read the whole affidavit.

Hearing Examiner SCHRUP. This, as I understand it from the Commission's resolution is not for me to pass on the merits of this. I am just merely to make a report of the record and to certify it to the Commission with the exhibits. It would be my understanding that I am not to evaluate the material, that is for the Commission—is that correct?

Mr. GRUIS. That is my understanding of the order, yes.

Mr. ROCKEFELLER. Mine, too.

Hearing Examiner SCHRUP. That would be my understanding.

Well, do you still have an objection after hearing Mr. Rockefeller's statement?

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. What would you propose in the alternative?

Mr. GRUIS. It appears to me that this question that is being raised now, as I understand Mr. Rockefeller's position, is that he is reserving his position insofar as Commission's jurisdiction, either judicial or to enforce this particular order. If that is the sole question, I had indicated off the record to Mr. Rockefeller, that I will take no exception to reserving his position on jurisdiction. However, I find now, [89] as a part of this affidavit, for example, an effort to show what was done by the respondent in terms of good faith and so on throughout the period that this order was in effect, to obtain some kind of direction or guidance from the Commission, and this goes to the very merits of our

jurisdictional question, and for this very reason I do not see its relevancy in this particular proceeding.

I would submit that if Mr. Rockefeller is so intent upon having the equities of his client's position known the proper time to do that would be to raise that question before the Commission when and if it chooses to challenge its jurisdiction for any future conclusion it should reach with respect to what to do with respect to this record certified by you.

Hearing Examiner SCHRUP. I understand that Mr. Rockefeller's position now is that most of the statement is argument of counsel as to his position.

Mr. ROCKEFELLER. Yes, sir. And I just really wanted to make this statement so that nobody would think later, you know, you just started thinking about this. Really, most of what I have said is just—I just wanted you all to know that maybe at one point these questions would be raised, if necessary. Forgive me for butting in. But I respectfully submit that Mr. Gruis is wrong on suggesting the connection between that matter, that is, my wanting to leave open the question of the validity of the order and the method of enforcement. This [90] is simply offering supplemental information on respondent's current posture as regards the law. I submit to you that this does not rebut in any way the admission of violations, and whether they were inadvertent or not, what they have done since when they are now complying with the law—whether they sought Commission's guidance—those things may be interesting—to go to somebody who is going to decide administratively how to handle it, but they do not abuse the violations, I realize that, and that is why I did not think that they were a proper matter in the stipulation, anyway. I just wanted to offer them in a supplementary way for whoever is going to deal with this matter.

Hearing Examiner SCHRUP. Is it your position, Mr. Gruis, that the Commission would not be entitled to consider that document that has been offered?

Mr. GRUIS. Not as part of this record, because it is not relevant to this particular proceeding. First off, again I submit that this stipulation was entered into. If such factors were going to be made a part of the overall understanding or picture of this particular proceeding they should appear as a part of the record itself, which is now formed by the stipulation itself, not on an ex parte type of introduction of equitable considerations.

Hearing Examiner SCHRUP. You are making it a little difficult for me, Mr. Gruis. As I understand it, Mr. [01] Rockefeller admits that this is in no way an attack on the stipulation. He stands by the stipulation, as I understand it.

Mr. ROCKEFELLER. Yes, sir.

Hearing Examiner SCHRUP. He admits the violations of the order.

Mr. ROCKEFELLER. Yes, sir.

Hearing Examiner SCHRUP. This is, as I understand it, just possible extenuating circumstances explaining what their new method of operation is. Is that correct?

Mr. ROCKEFELLER. What they are doing now. That is basically what we would like the Commission to know—what they are doing now—what is their intention.

Mr. GRUIS. Mr. Examiner, if I may—

Mr. ROCKEFELLER. We are offering this in the best way we can.

Mr. GRUIS. Let us assume, Mr. Examiner, that the record presented by you were certified by you to the Commission now sufficiently satisfies this Commission to move in performance of the enforcement petition to the appropriate court, to finalise the order now outstanding against the respondent in this particular matter. Once this record is certified to the Appellate Court as in past practices the Appellate Court as usually moved on the record made by the Commission alone, not by reassigning the matter to either a referee or an umpire [92] or back to the Commission to take further evidence. The whole purpose of this proceeding or hearing is lost if we are going to have introduced the question of equities or different considerations subsequently occurring to the violations in this matter.

Obviously this is a question for determination that would be before the Appellate Court at this time. Then the very reason it would have, if such questions were to be raised, the Appellate Court in its good judgment could do nothing other than to remind the matter back to the Federal Trade Commission once again to take further evidence in hearings to determine as to whether or not this is an accurate and representative portrayal of what the respondent is doing today. Then for what purpose have we had this hearing, sir? Absolutely none, because we are right back to where we started from.

My position, sir, is that this—Mr. Rockefeller contends this does not go to the stipulation. He is arguing straight restraining

his jurisdictional position. He is arguing the jurisdictional position. Item 7 of the particular stipulation sets out exactly what efforts were made by the respondent during the period at issue here in trying to obtain advice, guidance and what have you. I have not raised until this point, sir, that point, but during this very period his respondent, his client was being investigated by the Commission, and the Commission's policy is that once a client is under [93] investigation or is prone to be in a situation leading to litigation, it does not disclose the results of its investigation or give advice to people, whether they are or are not complying with the law.

Now I would say this very crucial in this particular matter, sir. And for this reason I will continue to press forward to have this affidavit omitted from the record as not being relevant and not being appropriate in the light of the stipulation that has been entered into by the parties.

Mr. ROCKEFELLER. Could I say something?

Hearing Examiner SCHRUP. Yes, sir, you may.

Mr. ROCKEFELLER. There may be some way in which we can get together on this—I hope so. I think that I am not sure really what the disagreement is. We all agree, would we not, that we could have forwarded this affidavit in to the Commission's Secretary and said, "Please ask the Commission to consider this in connection with its investigational hearing in Docket No. 7247," and that would have been objectionable. That would, I gather, be nothing wrong with that. We might have sent a courtesy copy to everybody here. Do you agree to that—that would not have been objectionable?

Mr. CATUIS. I think it would have been objectionable, because if there is a record being made here and you are going to raise such equitable interests or equitable considerations for past conduct, the proper place for that to come up would [94] be during the course of this hearing.

So far as I can see this hearing has been terminated by the stipulation, as well as by the motion to close it. If you choose not to have this particular hearing closed at this time and would like to introduce such facts, and would like to give the government an opportunity to cross examine, to investigate, to review and to consider the matters you are now attempting to put in the record through your argument, then I would say that I am still prone to having our stipulation withdrawn, and let us go ahead with the case.

Mr. ROCKEFELLER. All I want to do is for the Commission to get the facts. We stipulated as to what you wanted, so far as what your subpoenas would show. I would like the Commission to have some supplementary information. If you object to it, I say, Mr. Examiner, why do you not admit it and let him rebut it, if he wants? Let him prove that is untruthful. I do not know—I am not sure that I understand what his position is—relevant or irrelevant—if it is irrelevant, why does he want to rebut it—if it is not, maybe he could help to show that this is not true, if he suspects the truth of it.

Mr. GRUIS. If that is Mr. Rockefeller's final position on this thing, sir, I respectfully request permission to withdraw the motion as to this proceeding.

Hearing Examiner SCHRUP. Is there any other way that [95] this document can come before the Commission, except by incorporating it in this record?

Mr. GRUIS. I would assume that Mr. Rockefeller if and when the Commission concludes on what course to follow with respect to the record certified to them he surely has an opportunity to petition the Commission at any time whatsoever on behalf of his client in this particular proceeding.

Mr. ROCKEFELLER. Maybe the Commission ought to have some of the facts in here in coming to its conclusions as to what it is going to do on this record.

Mr. GRUIS. My position is that they have had no opportunity to answer these facts.

Hearing Examiner SCHRUP. That is what disturbs me a little bit, Mr. Rockefeller. While I expect he is not contradicting or he is accepting the affidavit, I think that maybe counsel would like to ask a few more questions of the people making the affidavit. Is that your position?

Mr. GRUIS. Sir, we agree that entering into this stipulation foreclosed ourselves from challenging the respondent in any other violations of law. True, it has a cut-off date. That cut-off date was supplied by counsel, by the respondent, that he was willing to take these violations up to this cut-off date. We agreed to that, providing we were not going to have this type of procedure. Now he raises the question that subsequent to that cut-off date these people are wonderful [96] people—they have been doing everything they are supposed to do—they have been making every effort to comply with the law. Sir, this completely changes the pos-

ture of this situation now. If this be the case, then I would like to reopen that cut-off date and to see whether or not they have continued with other violations in this industry—whether or not the facts that are in here, the statements in here, are accurate and truthful. This the Commission will not know unless we have such a record before it.

Hearing Examiner SCHRUP. In other words, if I should accept this document for inclusion in the record you would like then to withdraw your motion?

Mr. GRUIS. That is correct, sir. I would not only like to withdraw it, I would like to withdraw the stipulation, too, sir.

Mr. ROCKEFELLER. I certainly object to withdrawing the stipulation. I want to be as cooperative as I can.

Hearing Examiner SCHRUP. It seems to me, Mr. Rockefeller, that we have no quarrel there if you just did not offer this one document.

Mr. ROCKEFELLER. You just deny its submission and I will offer to prove the matters in it. Can we do that?

Hearing Examiner SCHRUP. How can we do that in the absence of any live witnesses?

Mr. ROCKEFELLER. I will either have to get them from [97] Portland, I guess, or maybe we could work out with Mr. Gruis some arrangements. As to the facts that he did not dispute.

Hearing Examiner SCHRUP. Let us take a recess and see if you gentlemen cannot work something out on this. I would like to avoid the expense to both the government and to Jantzen. I do not want to make a hasty ruling on this now—we have got quite a bit of the day left before us, so let us recess until 2 o'clock and see what you can work out.

Mr. GRUIS. All right, sir.

Mr. ROCKEFELLER. I appreciate that.

Hearing Examiner SCHRUP. We will recess this until 2 o'clock this afternoon.

(Whereupon, at 11:20 o'clock a.m., the hearing was in recess, to reconvene at 2:00 o'clock p.m., the same day.)

[98] Afternoon Session

2:00 p.m.

Hearing Examiner SCHRUP. The hearing will be in order. Have you gentlemen resolved your dilemma?

Mr. ROCKEFELLER. If I may speak up, sir, before the recess we had this discussion over an affidavit to which I have referred to in the course of my remarks by Mr. Donald E. Kennedy, of Jantzen, Inc. It is not our intention to offer that affidavit at this time, nor have we anything further to offer at this time.

Hearing Examiner SCHRUP. All right. Then the record will stand as heretofore made, that is, the stipulation has been entered into evidence. And, by the way, rather than taking a chance of losing the stipulation—it is only four pages long—I think that we might well have it copied into the record after the motion, and it will all be together, so will you do that, Mr. Reporter—after copying in the motion, copy in the stipulation.

Now, is there anything further then on the part of Commission counsel?

Mr. GRUIS. Not so far as we are concerned on this record, sir. We have offered you a proposed report.

Hearing Examiner SCHRUP. I have that, yes.

Mr. GRUIS. And I believe we supplied a copy of that to opposing counsel. We would like to have you consider that.

[99] Mr. ROCKEFELLER. Did you do that this morning? Yes, I have it. Thank you. May I ask this question: When the Examiner makes his report will Jantzen and Jantzen's counsel receive a copy of that?

Hearing Examiner SCHRUP. I do not know how that will be handled.

Mr. GRUIS. So far as I can see this is a report from the Hearing Examiner to the Commission. I am led to believe that this is not a matter of public record, although I would presuppose that you would be supplied or furnished with a copy of that. But I do think that this is within the prerogative of the Commission to state.

Mr. ROCKEFELLER. What we might simply do then is to make a request that that be the case. I would not argue it one way or the other. In the resolution the Commission directed that

the rules of practice shall apply to the extent that they are to apply, something to that effect, or words to that effect.

Hearing Examiner SCHRUP. It will be my understanding—maybe I am wrong on this—that this report, of course, is not a public record, but it will be submitted to the Commission.

Mr. GRUIS. Yes.

Hearing Examiner SCHRUP. But respondent could get a copy of that.

Mr. GRUIS. I would suppose that it would be available to them.

[100] Hearing Examiner SCHRUP. That is of this record.

Mr. GRUIS. Yes.

Hearing Examiner SCHRUP. The report will necessarily only encompass the record as made here today. So all I will have before me is the statement of both counsel and what arguments you have made relative to that, in addition the motion has been copied into the record and the stipulation has been copied into the record, and that is the whole of that which will go to the Commission. And instead of having the stipulation marked as an exhibit I think that we will strike the marking on that, and copy it in right into the transcript.

Mr. GRUIS. Fine, sir.

Mr. ROCKEFELLER. Yes, sir.

Mr. GRUIS. It might be that I should call your attention to this, in preparing this proposed report I had no way of envisioning what type of reservation Mr. Rockefeller would choose to make insofar as the jurisdictional question that he has raised during this discussion this morning was concerned and for that reason it may be that you may wish to note such a discussion or such a reservation insofar as your report concerns that.

Hearing Examiner SCHRUP. That is right. It is my understanding that I report to the Commission what has transpired. And, of course, I write no initial decision on this. And as I understand it I make no recommendation. I just merely [101] report it.

Mr. GRUIS. That is right.

Hearing Examiner SCHRUP. And certify the record and the report what has taken place.

Mr. GRUIS. That is correct.

Hearing Examiner SCHRUP. Is that your understanding?

Mr. ROCKEFELLER. That is the way I understand it.

Hearing Examiner SCHRUP. If there is nothing further then——

Mr. ROCKEFELLER. We will simply let stand the request that we be furnished a copy of your report to the Commission.

Hearing Examiner SCHRUP. That will go to the Commission and you can make your request and whatever way the Commission desires to act will be for them to decide.

I will await a copy of the transcript and then having that before me and with a consideration of the motion and all of the rest of the material I will just certify in my report to the Commission what has taken place.

Mr. ROCKEFELLER. Would it be your intention then at this time not to furnish us with a copy at the time?

Hearing Examiner SCHRUP. Well, I do not know whether I would be empowered to furnish you with a copy of it. You will have a copy of the transcript. And my report will merely reflect what appears in that transcript. If you want to make a [102] request after I file my report to the Commission, why you certainly are at liberty to do so. How the Commission will handle it I could not tell you, but as I understand it, this is a non-public investigational hearing and I merely certify this record to the Commission with my statement as to what the record contains with no recommendation, but here is what it is.

Mr. ROCKEFELLER. Maybe if Mr. Gruis had no objection at this time you could furnish us a copy.

Mr. GRUIS. It is my recollection that in the past proceedings of this nature a copy of the Hearing Examiner's report to the Commission is usually made available to the respondent or their counsel in connection with it or whoever appeared at the particular type of hearing. Whether or not because of the non-public nature of this proceeding the Commission would choose to do otherwise I cannot advise you.

Hearing Examiner SCHRUP. I do not know how that would be handled, but let me say this, I will make a report after the transcript comes in to the Commission and that will go to the Secretary's Office, as I understand it.

Mr. GRUIS. That is right, sir.

Hearing Examiner SCHRUP. At that time I can notify you that the report has been filed and you in turn can talk to Mr. Rockefeller.

Mr. GRUIS. And advise him that your report has gone [103] forward.

Hearing Examiner SCHRUP. And then you can speak to the Commission's Secretary and see how they want to handle it.

Mr. ROCKEFELLER. I appreciate that very much.

Mr. GRUIS. I might point out to the Hearing Examiner while it is true that you are certifying the facts forward insofar as to those facts you are obviously having to reach a conclusion—not a conclusion as to whether or not the order has been violated, but a conclusion as to whether or not the facts as set forth indicate that there has been either a discriminatory pricing act or practice insofar as these specific acts or practices are concerned. That, of course, is all contained in the stipulation itself, so that it is easy enough for you to draw such a conclusion.

Hearing Examiner SCHRUP. I will take all of that under advisement when I draft the report and after I have read the transcript. We have a rather lengthy transcript of what has occurred here this morning. I want to read over Mr. Rockefeller's argument and your argument, so that I can properly reflect what has been said to the Commission in summary form. Then, of course, I will have the entire record before me and they will also.

If there is nothing further then from Commission counsel——

Mr. GRUIS. Nothing.

[104] Hearing Examiner SCHRUP. Nothing from you?

Mr. ROCKEFELLER. Nothing further from the respondent.

Hearing Examiner SCHRUP. Then I understand that I shall enter an order cancelling the Portland, Oregon hearing, and quashing the subpoenas and that no returns are to be made on those.

Mr. GRUIS. That is right.

Hearing Examiner SCHRUP. This then today will be the entire record that will be certified to the Commission.

Mr. GRUIS. Yes, sir.

Hearing Examiner SCHRUP. You have withdrawn your proposed affidavit?

Mr. ROCKEFELLER. We never offered it. And we do that now.

Hearing Examiner SCHRUP. Fine, all right. Gentlemen, that being the situation I will close the record as of today, and as soon as the transcript is available I will attempt to prepare the report. I do not understand that we probably will have this transcript at a very early date. I am going to go on another matter to Chicago next week and it may well take me a good part of December.

Mr. GRUIS. When may we anticipate the preparation of the report?

Hearing Examiner SCHRUP. As soon as I am free to do so and as soon as the transcript is here. I have been loaned [105] by the Commission to another agency for three possible hearings, two in December in Chicago and one set for January. And how lengthy they will be I do not know.

Mr. GRUIS. I only raise the question with respect to what Mr. Rockefeller and myself have to do as to our future plans of scheduling, so far as when the report goes forward as to our availability to act accordingly.

Hearing Examiner SCHRUP. It will be very doubtful if I will be able to do this in December, but I certainly hope to do so the first opportunity in January.

Mr. GRUIS. Thank you.

Hearing Examiner SCHRUP. It will be available to us, anyway, in several weeks. All right, I will notify you as soon as I sent forward the report, Mr. Gruis, and then you in turn can notify Mr. Rockefeller and Mr. Rockefeller can then consult with the Secretary a gto whatever they want to do on the part of the Commission.

Mr. ROCKEFELLER. Thank you.

Hearing Examiner SCHRUP. All right, we will stand adjournment, gentlemen.

Thank you.

(Whereupon, at 2:10 o'clock p.m. the above-entitled prehearing conference was concluded.)

[65] [Omitted printed page 73 infra]

[105-A] In the United States Court of Appeals for the Ninth Circuit

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC., RESPONDENT

Application for Affirmance and Enforcement of an Order of the Federal Trade Commission—Filed April 22, 1965

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COMES NOW the Federal Trade Commission, hereinafter referred to as the "Commission", pursuant to the provisions of the Act of October 15, 1914, 38 Stat. 730, as amended, 15 U.S.C. 12 et seq., commonly known as the Clayton Act, and respectfully files this application for a decree affirming and enforcing a certain order to cease and desist issued by the Commission against the respondent, Jantzen, Inc., and its officers, representatives, agents and employees. The proceeding resulting in the [105-B] said order to cease and desist is identified in the records of the Commission as: "In the Matter of Jantzen, Inc., Docket 7247" (55 F.T.C. 1065 (1959)).

In support of this application, the Commission respectfully shows:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as "commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories. Respondent resides and carries on business in this judicial circuit, and this Court therefore has jurisdiction of this application by virtue of the provisions of Section 11 of the Clayton Act, as amended, ch. 1184, 64 Stat. 1126 (1950), as amended.

2. Upon proceedings conducted pursuant to and in accordance with Section 11 of the Clayton Act, the Commission on September 4, 1958, issued and subsequently served its complaint upon the respondent. Thereafter the matter was assigned to a hearing examiner to whom there was submitted on November 25, 1958, an "Agreement Containing Consent Order

To Cease And Desist," which had been entered into between respondent and the attorneys for both parties. [105–C] The Commission, on January 16, 1959, issued, under subsection (d) of Section 2 of the Clayton Act, as amended, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13(d), its said order to cease and desist which reads as follows:

> IT IS ORDERED that respondent, Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Said order to cease and desist was duly served upon the respondent on January 22, 1959, was modified on March 26, 1959, and since that date has been, and is now, in full force and effect.

3. The Commission, having reason to believe that respondent, its officers, representatives, agents and employees might have violated the said order to cease and desist, and that the public interest required an investigation to determine the extent to which such violations might have occurred, resolved and ordered on July 22, 1964, that a non-public investigational hearing be conducted to determine whether or not respondent had [105–D] violated the said order. The Commission further ordered: (a) that one of its hearing examiners be designated to preside at such hearing and to certify the record with his report thereon to the Commission; (b) that respondent have the right of due notice, of cross-examination, and of production of evidence in rebuttal; and (c) that the hearing be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

4. The order of the Commission directing the non-public investigational hearing was served upon the respondent on July

27, 1964, and hearing was set by a duly designated hearing examiner for November 30, 1964, at Portland, Oregon. Prior to the scheduled date for said hearing counsel for the Commission and counsel for the respondent entered into a "Stipulation", in which the respondent admitted that it has failed to comply with the provisions of the said order to cease and desist and consented to having all further hearings before the hearing examiner closed.

After receiving the said stipulation and making it part of the record in this proceeding, the hearing examiner on November 23, 1964, issued his order cancelling the scheduled hearing and closing the record in the said non-public investigational hearing.

[105–E] 5. On January 14, 1965, the examiner certified the record and his report to the Commission, and after duly considering the record certified by the examiner, the Commission on April 12, 1965, made its report entitled "Report of the Federal Trade Commission Upon Its Investigation of Alleged Violations of Its Order to Cease and Desist", in which the Commission found that the respondent has paid advertising or promotional allowances in direct violation of the Commission's said order to cease and desist. The said report of the Commission was duly served upon the respondent on April 13, 1965.

6. Based on the foregoing, the respondent, and its officers, representatives, agents and employees are charged with having failed, neglected and refused to obey the said order to cease and desist.

NOW, THEREFORE, in consideration of the premises and being without remedy save in a United States Court of Appeals where, by virtue of the provisions of Section 11 of the Clayton Act, as amended, matters of this nature are exclusively and properly cognizable, the Commission respectfully applies to this Honorable Court for a decree enforcing its said order to cease and desist issued against respondent, its officers, representatives, agents and employees.

Pursuant to Section 11 of the Clayton Act, the Commission has certified and is filing concurrently with this [105–F] application: (1) a transcript of the record in the original proceeding against the respondent, including the aforementioned "Agreement Containing Consent Order to Cease and Desist," the initial decision of the hearing examiner, and the

order to cease and desist based thereon; and (2) the complete record made at the investigational hearing of the respondent's violations of the said cease and desist order, including the said stipulation, the hearing examiner's report, and the Commission's report and its findings and conclusions thereon.

WHEREFORE, the Federal Trade Commission prays that this Court cause notice of the filing of this application and the filing of the entire record in this proceeding to be served upon respondent, and that the Court affirm the Commission's said order to cease and desist, and that the Court make and enter its decree enforcing the said order to cease and desist and command respondent, its officers, representatives, agents and employees to obey the same and to comply therewith.

Respectfully submitted,

JOSEPH J. GERCKE,
Attorney,
EDWARD G. GRUIS,
Attorney,
GERALD T. GREGORY,
Attorney,
Federal Trade Commission.

Dated this 2nd day of April 1965.

[106] In the United States Court of Appeals for the Ninth Circuit

[Title omitted]

[File Endorsement omitted in printing]

Answer to Application for Affirmance and Enforcement of an Order of the Federal Trade Commission—Filed May 11, 1965

To the Honorable the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Jantzen, Inc., in response to the Application for Affirmance and Enforcement filed in this Court on April 22, 1965, by petitioner the Federal Trade Commission, answers as follows:

1. Respondent denies the averment that petitioner is proceeding in this Court pursuant to the provisions of the Act

of October 15, 1914, 38 Stat. 730, as amended, 15 [107] U.S.C. 12 *et seq.*, or pursuant to the provisions of any other statute, and admits the remaining averments of the unnumbered paragraph on pages 1 and 2 of the Application.

2. Respondent denies the averment that this Court has jurisdiction of petitioner's Application by virtue of the provisions of Section 11 of the Clayton Act, as amended, ch. 1184, 64 Stat. 1126 (1950), as amended, or by virtue of the provisions of any other statute, and admits the remaining averments of paragraph 1 of the Application.

3. Respondent denies that the "full force and effect" of the order issued against it by petitioner on January 16, 1959, includes enforceability in this Court, if it be averred, and admits the remaining averments of paragraph 2 of the Application.

4. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averments that petitioner had reason to believe that respondent, its officers, representatives, agents, and employees might have violated the order entered against it on January 16, 1959, and that the public interest required an investigation to determine the extent to which such violations might have [108] occurred, and admits the remaining averments of paragraph 3 of the Application.

5. Respondent admits the averments of paragraph 4 of the Application.

6. Respondent admits the averments of paragraph 5 of the Application.

7. Respondent is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 6 of the Application.

8. Respondent denies the averment that matters of this nature are exclusively and properly cognizable, or cognizable at all, in a United States Court of Appeals by virtue of the provisions of Section 11 of the Clayton Act, or by virtue of the provisions of any other statute, and is without knowledge or information sufficient to form a belief as to the truth of the averment that petitioner is otherwise without remedy, and admits the remaining averments of the unnumbered paragraph beginning "Now, THEREFORE" on page 5 of the Application.

[109] 9. Respondent denies the averment that the action of petitioner in certifying and filing, or either of them, a transcript and record, or either of them, was pursuant to Section 11 of the Clayton Act, or pursuant to any other statute, and admits the

remaining averments of the unnumbered paragraph beginning "Pursuant to" on pages 5 and 6 of the Application.

10. As a first defense, respondent avers that this Court lacks jurisdiction to entertain the Application or to grant the relief prayed therein, for the reason that no statute of the United States confers jurisdiction upon the United States Courts of Appeals to entertain an application for the affirmance and enforcement of an order issued by petitioner to cease and desist from violating the Clayton Act, or to affirm such an order, or to enter a decree enforcing such an order, or to command persons against whom such an order has been issued to obey the same or to comply therewith.

11. In support of the aforesaid first defense, respondent avers that the statutory provisions relied upon by petitioner to establish the jurisdiction of this Court [110] were repealed by the Act of July 23, 1959, P.L. 86-107, 73 Stat. 243, and that no other statute of the United States confers such jurisdiction.

12. As a second defense, and in the alternative, respondent avers that this Court lacks jurisdiction to entertain the Application or to grant the relief prayed therein, for the reason that no statute of the United States confers jurisdiction upon the United States Courts of Appeals to entertain an application for the affirmance and enforcement of an order issued by petitioner to cease and desist from violating the Clayton Act, the issuance of which has not followed the procedure prescribed by Section 11(b) thereof, or to affirm such an order, or to enter a decree enforcing such an order, or to command persons against whom such an order has been issued to obey the same or to comply therewith.

13. In support of the aforesaid second defense, respondent avers that the statutory provisions relied upon by petitioner to establish the jurisdiction of this Court [111] confer such jurisdiction only with respect to orders issued after a hearing the testimony in which is reduced to writing and filed in the office of petitioner, and after the making of a report in writing in which petitioner states its findings as to the facts, and that the order issued against respondent by petitioner is not within that class of order, and that no other statute of the United States confers such jurisdiction with respect to the order issued against respondent by petitioner.

14. As a third defense, respondent avers that this Court should deny the relief prayed in the Application, for the reason

that petitioner has unlawfully withheld from respondent its consideration whether the public interest would be fully safeguarded through administrative disposition of this matter on an informal nonadjudicatory basis.

15. In support of the aforesaid third defense, respondent avers that on July 11, 1963, by publication in the Federal Register, 28 Fed. Reg. 7080, petitioner promulgated rules of general applicability, entitled General Procedures, 16 C.F.R. § 1.1 (Supp. 1964), of which Subpart C entitled "Informal Enforcement Procedure", § 1.21 entitled "Voluntary compliance", provides:

[112] "The Commission, when it has information indicating that a person or persons may be engaging in a practice which may involve violation of a law administered by it, and if it deems the public interest will be fully safeguarded thereby, may afford such person or persons the opportunity to have a matter disposed of on an informal nonadjudicatory basis. In determining whether the public interest will be fully safeguarded through such informal administrative action, the Commission will consider (1) the nature and gravity of the alleged violation; (2) the prior record and good faith of the parties involved; and (3) other factors, including, where appropriate, adequate assurance that the practice has been discontinued and will not be resumed.";

that on January 28, 1965, respondent filed with petitioner an "Application for Disposition of Investigation Under Section 1.21" which sought the resolution of the present controversy under the procedures prescribed by Section 1.21 of petitioner's General Procedures; that on April 9, 1965, petitioner issued an "Order Denying Respondent's Request for Informal Disposition" which failed to indicate that petitioner had made the determination required by Section 1.21 but merely recited that "this matter is not suitable for disposition under § 1.21 of the Rules of Practice"; that petitioner thereby either erroneously determined that the procedure for consideration prescribed by Section 1.21 is [113] inapplicable to matters involving violations of orders issued by petitioner to cease and desist from violating the Clayton Act, or discriminatorily refused to apply in this matter the procedure for consideration prescribed for all such matters by Section 1.21; and that petitioner's action was in either event arbitrary, capricious, an abuse of discretion,

otherwise not in accordance with law, contrary to constitutional requirement, power, privilege, and immunity, and without observance of procedure required by law.

WHEREFORE, respondent prays that this Court dismiss petitioner's Application, or, in the alternative decline to enforce the order issued against respondent by petitioner, and grant respondent such other or further relief as may be just and proper.

JANTZEN, INC.,
By
/s/ EDWIN S. ROCKEFELLER,
/s/ JOEL E. HOFFMAN,

Wald, Harkrader & Rockefeller
1225 Nineteenth Street, N.W.
Washington, D.C. 20036

Of Counsel:
PAUL GERHARDT,
Jantzen, Inc.
P.O. Box 3001
Portland, Oregon 97208

[114] United States Court of Appeals for the Ninth Circuit

Before: POPE, JERTBERG & DUNIWAY, Circuit Judges

Order of Submission—January 14, 1966

This cause coming on for hearing, Thomas F. Howder, Attorney, F.T.C., argued for the appellant, and Edwin S. Rockefeller, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

[115] United States Court of Appeals for the Ninth Circuit

Before: POPE, JERTBERG & DUNIWAY, Circuit Judges

Order Directing Filing of Opinion and Filing and Recording of Judgment—February 4, 1966

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[116] United States Court of Appeals for the Ninth Circuit

No. 20021

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

JANTZEN, INC., RESPONDENT,

Opinion—February 4, 1966

PETITION TO ENFORCE AN ORDER OF THE FEDERAL TRADE COMMISSION

Before: POPE, JERTBERG AND DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

The Federal Trade Commission seeks enforcement of a cease and desist order, issued by it on January 16, 1959 (55 F.T.C. 1065) and modified on March 26, 1959.[1] No proceedings relating to the order were begun by either party in this court or any court until the present petition was filed on April 22, 1965. It arises from a proceeding begun by the Commission on July 22, 1964, based upon the Commission's belief that Jantzen might not be complying with the order. At a prehearing conference on November 23, 1964, Jantzen admitted certain violations of the order. At the same time Jantzen took the position (1) that the order is invalid and (2) that, if it is valid, there is no method provided by law for its enforcement. It presents the same contentions here. We hold that we have no jurisdiction in this proceeding, and therefore do not pass upon the first question.

[117] The cease and desist order followed the filing of a Commission complaint that charged violation of Section 2(d) of the Clayton Act, 38 Stat. 730 (1914) as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1964). The Commission was authorized to issue such an order by Section 11 of the Clayton Act, 38 Stat. 734 as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 21 (1958). We therefore refer to it as a "Clayton Act order," to distinguish it from orders issued by the Commission in the course of its duty to enforce the Federal

[1] The order was issued pursuant to a written consent, whereby Jantzen waived any further procedural steps, the making of findings of fact and conclusions of law, and all right to contest the validity of the order.

Trade Commission Act, 38 Stat. 717, 719, § 5 (1914), 15 U.S.C. § 45, as amended. We refer to these as F.T.C. Act orders.

Until 1938, the method of enforcing both types of orders was essentially the same. Section 11 of the Clayton Act, *supra*, as it read when the order here involved was issued, contained 7 paragraphs. The first authorized the Commission to enforce, *inter alia*, section 2. The second set up a procedure for the issuance by the Commission and service of a complaint, for a hearing, and, upon finding violation, for the issuance of a cease and desist order. The third dealt with enforcement of such an order, and read, in pertinent part, as follows:

> "If such person fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may apply to the United States court of appeals * * * for the enforcement of its order * * *. [T]he court * * * shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission * * *. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *." (64 Stat. 1127–8)

The fourth gave the respondent a similar right to petition the Court of Appeals for review of the order, without limit as to the time within which to do so. The remaining 3 paragraphs are not material to our problem.

Section 5 of the Federal Trade Commission Act, *supra*, contained, in its third, fourth and fifth paragraphs, substantially identical provisions regarding F. T. C. orders.

No penalty attached to the violation of either type of order. In order to obtain an enforcing order in the Court of Appeals, [118] a second violation had to be shown. This was done, as in this case, by the Commission's ordering an investigation, appointing a hearing officer, and, usually, holding a hearing.[2] (See the Commission's Rules at 16 C.F.R. § 1.35.) If a violation was found, the Commission then sought enforcement in the Court of Appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. Such a decree had the force of an injunction, and, if thereafter the Commission found further violation, it could bring the respondent before the court for punishment for contempt.

[2] A hearing was not necessary here, because of Jantzen's admissions and stipulation of violation at a pre-hearing conference.

Not surprisingly, this very clumsy and time consuming procedure was severely criticized, and in 1938 the Congress responded by adopting the Wheeler-Lea Act, 52 Stat. 111, section 3 of which (52 Stat. 111–114) amended section 5 of the Federal Trade Commission Act. That section (3) states: "Section 5 of such Act * * * is amended to read as follows: * * *." The amended section contains 12 paragraphs, designated (a) through (*l*). Paragraph (b) retains substantially the same provision for the issuance of cease and desist orders as was contained in the old third paragraph. Paragraph (c), however, is different. It provides for a petition by the respondent to the Court of Appeals for review of the order. The petition must be filed within sixty days from the date of service of the order. The court has similar powers to those conferred by the old section, but with the added power to decree enforcement. In general, the new paragraph (c) is comparable to the old fifth paragraph of the section (38 Stat. 720). The former fourth paragraph, providing for a petition by the Commission, is omitted. Paragraphs (g), (h), (i), and (j) provide for the finality of Commission orders—either when the period in which to petition for review expires or, if there be such a petition, then within a fixed time after the completion of subsequent court and Commission proceedings. All of this is new, as is paragraph (*l*). It subjects violators of final orders to "a civil penalty of $5000 for each violation." This has been since amended (64 Stat. 21, 1950) to provide that each separate violation shall be a separate offense, and, if the violation is a continuing one, each day of its continuance is a separate offense.

[119] The normal rule is that when an Act amends a previous Act "to read as follows" this is as much an express repeal of those provisions which are omitted[3] as it is an

[3] No doubt the Congress could add to each such amending statute a provision that "everything omitted by this Act from the statute (or section) that is hereby amended is hereby repealed," or other words to like effect, but the law does not require such laborious absurdities. See *Heinze* v. *Butte & Boston Consol. Mining Co.*, 9 Cir., 1901, 107 Fed. 165, 167; *United States* v. *Kelly*, 9 Cir., 1899, 97 Fed. 460, 462; *United States* v. *Baker*, 3 Cir., 1961, 293 F. 2d 613, 617–18; *H. Rowe Co.* v. *Crivella*, 8 Cir., 1939, 105 F. 2d 434, 436; *Rowan* v. *Ide*, 5 Cir., 1901, 107 Fed. 161; *Columbia Wire Co.* v. *Boyce*, 7 Cir., 1900, 104 Fed. 172, 174; Endlich, *Interpretation of Statutes* § 196 (1888); Crawford, *Statutory Construction* §§ 304, 305 (1940); 1 Sutherland, *Statutory Construction* § 1932 (3d ed. 1943); 82 C.J.S., Statutes, § 294, pp. 503–4; *cf. Posadas* v. *National City Bank*, 1936, 296 U.S. 497,

express enactment of those provisions which are added and a continuation in effect, rather than a repeal and new enactment, of those provisions which remain unchanged.

No doubt in recognition of this rule, the Wheeler-Lea Act deals with its effect on pending cases. Section 5(a) of the amending Act reads:

> "(a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5(c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act." (52 Stat. 117)

Thus, if the order before us were an F.T.C. order, we would have no problem. The order would be final and enforcible via the civil penalty route, and the Commission would not be here.

But Clayton Act orders were not affected by the Wheeler-Lea Act. They are, however, affected by the so-called Clayton Finality Act, 73 Stat. 243 (1959); 15 U.S.C. § 21 (1964). In substance, it does for Clayton Act orders what the Wheeler-Lea Act did for F.T.C. orders. The technique of amendment is the same. It provides, in pertinent part:

[120] "(a) the first and second paragraphs of section 11 of the [Clayton] Act * * * are hereby redesignated as subsections (a) and (b) of such section, respectively."

It then adds a sentence to the second paragraph, which it designates as (b), dealing with proceedings before the Commission leading to issuance of a cease and desist order. It continues:

"(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written

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502-6; *Murdock* v. *City of Memphis*, 1875, 87 U.S. (20 Wall.) 590, 617; *Stewart* v. *Kahn*, 1870, 78 U.S. (11 Wall.) 493, 502.

petition praying that the order of the commission or board be set aside. * * *" (73 Stat. 243)

It is unnecessary to reproduce the balance of the amended section. It is almost verbatim the same as section 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act. The effect of the statute is to produce a revised section 11 of the Clayton Act, containing 12 paragraphs designated (a) through (*l*), and providing the same method of review at the instance of the respondent only, the same power of the court, the same time limitation, the same rules as to finality, and the same civil penalties for violations as does amended section 5 of the Federal Trade Commission Act.

The former third paragraph which we have quoted in part earlier in this opinion is omitted in its entirety. That is the paragraph which provided for the type of proceeding to enforce, brought here by the Commission, that is now before us. For reasons already stated, we are of the opinion that the amendment, by omitting the third paragraph, repealed it.

Like the Wheeler-Lea Act, the Finality Act contains a paragraph relating to prior cases, which reads:

[121] "Sec. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act." (73 Stat. 245–46)

It will be noted that, unlike the corresponding section 5(a) of the Wheeler-Lea Act, this section does not deal with cease and desist orders issued before its effective date, nor provide for their becoming final within the meaning of the amended Act. It deals solely with proceedings begun in a Court of Appeals, which is the subject to which the former third and fourth paragraphs related. Thus the third paragraph is expressly continued in effect for this very limited purpose, namely, the completion of proceedings for enforcement initiated by the Commission in a Court of Appeals. To us, this is a strong indication that the

Congress knew, and intended, that it was repealed for other purposes. The Finality Act is closely modelled on the Wheeler-Lea Act, which makes the difference between section 2 of the Finality Act and section 5(a) of the Wheeler-Lea Act even more significant.

It is significant, too, we think, that immediately after the adoption of the Finality Act, the Commission itself took the position that existing Clayton Act orders would become final within 60 days, under the new law, just as under the Wheeler-Lea Act, even though the Finality Act does not contain the language to that effect that appears in section 5(a) of the Wheeler-Lea Act. The Court of Appeals for the District of Columbia Circuit refused to accept this view. *Sperry Rand Corp. v. FTC*, 1961, 288 F. 2d 403; *Schick Inc. v. FTC*, 1961, 288 F. 2d 407; *FTC v. Nash-Finch Co.*, 1961, 288 F. 2d 407. In its briefs in those cases, the Commission strongly urged that the former enforcement procedure, which it now seeks to invoke, was no longer in effect.

The Commission's present position is directly contrary to the position that it took then. This does not necessarily mean that its [122] present view is wrong.[4] It relies, first, upon the established rule of statutory construction, that repeals by implication are not favored. That rule, however, does not apply here. As we have already indicated, we think that the repeal in this case was express. (See also, *Sperry Rand Corp. v. F.T.C., supra.*)[5]

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[4] We think that it does mean, however, that we owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute, the adoption of which it helped to procure. (*Cf. FTC v. Mandel Bros., Inc.*, 1959, 359 U.S. 385, 391; *Norwegian Nitrogen Prods. Co. v. United States*, 1933, 288 U.S. 294, 315.)

[5] Of the five cases principally relied upon by the Commission, three are not even closely in point. Each deals with a supposed conflict between two separate statutes or sections, adopted or amended at different times, not with a statute expressly amending a particular statute or section to read in a different way. (*Mercantile Nat'l Bank v. Langdeau*, 1963, 371 U.S. 555, 565-67; *United States v. Borden Co.*, 1939, 308 U.S. 188, 198-201; *Lietz v. Flemming*, 6 Cir., 1959, 264 F. 2d 311, 313.) Two others are more closely in point, but do not involve the effect of the omission, in the amending statute, of a provision that was contained in the same statute before the amendment. They both hold that, insofar as former language is retained

It next urges that the purpose of the Clayton Finality Act was to establish, for Clayton Act orders, the same method of enforcement as was already applicable under the Wheeler-Lea Act to [123] F.T.C. orders. There is no doubt that that was the purpose.[8] There is also no doubt that, as to future orders,

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in the amended section, there has not been a repeal and a new enactment, but only the continuance in effect of the old provisions that are thus retained. (*Posadas v. National City Bank*, 1936, 296 U.S. 497, 506; *Rithols v. Marsh*, D.C. Cir., 1939, 105 F. 2d 937). *Rithols* is the converse of this case. It deals with the Wheeler-Lea Act, and holds that, because the portion of section 5 of the Federal Trade Commission Act authorizing the Commission to issue cease and desist orders was retained in the amended section, there was no repeal and new enactment of that portion, but that it continued in effect. We quite agree, but that does not answer the question here posed.

[8] The title of the Clayton Finality Act reads:

"AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes." (73 Stat. 243)

The House Report accompanying the Act, H.R. Rep. No. 580, 86th Cong., 1st Sess. 4, quoted in *FTC v. Henry Broch & Co.*, 1962, 368 U.S. 360, at 365–66 n. 6, says:

"The Clayton Act, in its present enforcement procedures, permits a person to engage in the same illegal practices three times before effective legal penalties can be applied as a result of action by the commission or board vested with jurisdiction. First, in order to issue and serve a cease-and-desist order initially, the commission or board must investigate and prove that the respondent has violated the prohibitions of the Clayton Act. No provisions of the Clayton Act, however, makes the commission or board's cease-and-desist order final in the absence of an appeal by the respondent for judicial review. At the present time, the Clayton Act contains no procedure by which the commission or board may secure civil penalties for violations of its orders.

"Second, before the commission or board may obtain a court ruling that commands obedience to its cease-and-desist order, it must again investigate and prove that the respondent has violated both the order and the Clayton Act. The jurisdiction of the court of appeals, under the present provisions of Clayton Act section 11, cannot be invoked by the commission or board unless a violation of the cease-and-desist order is first shown.

"Third, enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the court's order. This entails a third hearing before the commission and a review thereof by the court of appeals.

"In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders

that purpose was fully accomplished. But it is equally clear, as we have already shown, that the Congress dealt with orders already outstanding in a different manner in the two Acts. In the case of F.T.C. Act [124] orders, it made the new remedy fully applicable to existing orders. In the case of Clayton Act orders, it did not do this. Instead, it expressly preserved the old methods, but only as to a limited class of such orders.

The Commission says that it has case authority for its position. It cites two cases in which enforcement of a pre-Finality Act order was decreed, without opinion: *FTC v. Pacific Gamble Robinson Co.*, 9 Cir., 1962, No. 18,260, not reported, and *FTC v. Bennus Watch Co.*, 2 Cir., 1962, No. 27,752, not reported. The order was not opposed in either case. These cases are not authority on the question.[7] It also cites two cases involving investigations by it to determine whether pre-Finality Act orders were being obeyed: *Wanderer v. Kaplan*, D.D.C., 1962, CCH Trade Cases, ¶70,535; *Nash-Finch Co. v. FTC*, D. Minn., 1964, 233 F. Supp. 910. Neither of these cases involved the jurisdiction of a Court of Appeals to enforce such an order. Such dicta as they contain is hardly authoritative on the question.

Next, it cites dicta in *Sperry Rand Corp. v. FTC, supra*,[8] and language in *FTC v. Henry Broch & Co., supra*, fn. 6.[9] It is

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issued thereunder are much simpler and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time."

[7] *Brown Shoe Co. v. United States*, 1962, 370 U.S. 294, 307; *Cross v. Burke*, 1892, 146 U.S. 82, 87.

[8] There the court said:

"Enforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered. It follows that the basis for the relief sought, namely, review of the order of November 3, 1958, and of the order of the Commission denying petitioner's motion to modify or set aside the order of November 3, 1958, disappears." (288 F. 2d at 406–7)

[9] The language relied on is:

"In considering *Broch's* challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply to enforcement of the instant order. In conse-

per-[125]fectly clear that the question here presented was not before the court in either case. We have already discussed *Sperry Rand Corp.* The *Broch* case also involved a pre-Finality Act order, issued December 10, 1957. The respondent petitioned for review, and the Seventh Circuit set the order aside on December 11, 1958 (*Henry Broch & Co. v. FTC*, 261 F. 2d 725). The Commission sought and obtained certiorari, and the Supreme Court reversed on June 6, 1960 (*FTC v. Henry Broch & Co.*, 1960, 363 U.S. 166). On remand, the Seventh Circuit modified the order, and affirmed it as modified on November 3, 1960 (*Henry Broch & Co. v. FTC*, 285 F. 2d 764). The Commission again sought certiorari, and again the Supreme Court granted it, and reversed (368 U.S. 360). Thus, when the Finality Act was passed in 1959, the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act. It falls squarely within the language of Section 2 of the Finality Act, and the Supreme Court's language, as applied to it, is clearly correct. As applied to this case, which does not fall within Section 2, the language is not even applicable dictum.

Finally, the Commission asserts that, unless its views are accepted, "forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist would be wiped from the books." It urges that this result is quite contrary to the congressional intent, which was, as we have seen, to strengthen enforcement by the Commission of the Clayton Act. It says that Congress "did not intend to grant amnesty to the almost 400 law violators under order." To these arguments there are two answers, one legal, the other practical.

The legal effect of the Commission's argument is to ask us to insert into the Finality Act something that is not there. In *Sperry Rand Corp., supra*, the Commission asked the court, in substance, to insert into the Finality Act the provisions of sec-

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quence, Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 477-480." (368 U.S. at 364-65)

tion 5(a) of the Wheeler-Lea Act. Indeed, it had tried to accomplish the same thing by press release. The court quite properly declined to do what the Commission asked. (See 288 F. 2d at 406.) What [126] we are now asked to do, in substance, is to insert into section 2 of the Finality Act a provision making it applicable to outstanding cease and desist orders as to which proceedings had *not* been initiated, before the date of enactment, under the third and fourth paragraphs of the former section 11 of the Clayton Act, and this in spite of the fact that the section applies only where such proceedings *have* been initiated. Whether the omission of such a provision was intentional, as it may have been, or inadvertent, as it may also have been, is immaterial. It is not the business of courts, under the guise of construction, to put into a statute what Congress has left out.[10]

The practical answer to the Commission's argument is clear. The Commission is indulging in hyperbole. We do not, by our holding, wipe forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist from the books, nor do we grant amnesty to any law violator, much less to 400. The orders are still there, and still as valid as they ever were. Part of the Commission's function has always been to educate and to persuade. The orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were. There is a presumption that people obey the law; we would suppose that it applies to obedience to FTC orders. The fact that there are 400 orders outstanding from forty-five years of enforcement, none of which the Commission has yet sought to enforce, is somewhat persuasive that the presumption is a valid one.

Moreover, as the Commission points out in its brief, the former enforcement procedures were "somewhat inadequate," since "no meaningful sanctions were provided for enforcement of cease and desist orders." The Commission says:

> "Senator Sparkman, speaking on the floor of the Senate in 1957, commented (103 Cong. Rec. 690): 'In this light it is readily understandable why contempt proceedings to enforce a Clayton Act order have been successful only twice since 1940.'"

[10] *Hanover Bank* v. *Commissioner*, 1962, 369 U.S. 672, 677–678; *Iselin* v. *United States*, 1926, 270 U.S. 245, 251; *Ebert* v. *Poston*, 1925, 266 U.S. 548, 554.

[127] See also fn. 6, *supra*. We cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement,[11] with its requirement that three successive violations be found before one can be punished. (*FTC* v. *Ruberoid Co.*, 1952, 343 U.S. 470.) All that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order. Such an order will give the Commission the full benefit of the Finality Act, and after only two bites at the apple instead of three. Congress may well have felt that this was a better disposition of old cases than to perpetuate the old system as to old orders. This, we think, is the result of what Congress did.

In its reply brief, the Commission suggests, for the first time in a footnote, that the General Savings Statute, 61 Stat. 635 (1947), 1 U.S.C. § 109, preserves the remedy that it seeks.[12] We think not. This proceeding is not based upon a violation that occurred *before* the Finality Act was adopted, but on further violation occurring *after* its adoption in 1960 and 1962. (See *FTC* v. *Ruberoid Co.*, *supra*.) Thus there is not here involved a "penalty, forfeiture or liability" incurred under the former statute. Here, we deal with a statute which formerly conferred jurisdiction on this court, and which, except as to a limited class of [128] cases, of which this is not one, has been repealed. *Cf. De La Rama S.S. Co.* v. *United States*, 1953, 344 U.S. 386,

[11] The Commission, in its brief, says that the system that it here seeks to perpetuate was characterized, in Congressional hearings as "ineffectual; cumbersome; lacking teeth; awkward, slow and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic," and its enforcement of its orders under that system as "handicapped, hampered and weakened," leaving the Commission "poorly equipped to discharge its responsibilities," and leading to "diminution of the intended purpose" of the Clayton Act. We find it not surprising that Congress did not choose to perpetuate such an obviously objectionable system. We also find it somewhat surprising that the Commission is now asking us, by a bit of judicial legerdemain, to recreate it.

[12] "§ 109. *Repeal of statutes as affecting existing liabilities.*

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *."

390. Moreover, the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method. *Cf. United States* v. *Obermeier*, 2 Cir., 1950, 186 F. 2d 243, 251–55, *cert. denied*, 1951, 340 U.S. 951.

The petition is dismissed for want of jurisdiction.

[129]

United States Court of Appeals for the Ninth Circuit

No. 20021

FEDERAL TRADE COMMISSION, PETITIONER

vs.

JANTZEN, INC., RESPONDENT

Decree—Filed February 4, 1966

Before: POPE, JERTBERG AND DUNIWAY, Circuit Judges

This cause came on to be heard upon the petition of the Federal Trade Commission, filed April 22, 1965 to review an order of the Federal Trade Commission issued by it on April 12, 1965. The Court heard argument of respective counsel on January 14, 1966 and has considered the briefs and transcript of record filed in the cause. On February 4, 1966, the Court being fully advised in the premises handed down its decision.

In conformity thereto it is hereby ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the petition to review in above cause be and hereby is dismissed for want of jurisdiction.

[130] Clerk's Certificate to foregoing Transcript Omitted in Printing

[1311] Supreme Court of the United States

No. ——

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, PETITIONER

vs.

JANTZEN, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—MAY 5, 1966

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 1, 1966.

W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of May, 1966.

[1312] Supreme Court of the United States

No. 310

OCTOBER TERM, 1966

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 4, 1966.

OPINION BELOW

The opinion of the court of appeals (App. A., *infra*, pp. 1a–16a) is reported at 356 F. 2d 253. The opinion of the Federal Trade Commission (R. 61–64) [1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1966 (App. B., *infra*, p. 17a). On May

[1] "R." refers to the two-volume Transcript of Record in the court of appeals.

5, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Finality Act of 1959, which amended the procedure for review and enforcement of Clayton Act cease-and-desist orders, repealed the authority of the Federal Trade Commission and the jurisdiction of the courts of appeals to enforce unreviewed orders issued prior to the amendment.

STATUTES INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended prior to July 23, 1959, 15 U.S.C. (1958 ed.) 21, the Finality Act of 1959, 73 Stat. 243, and the General Savings Statute, Rev. Stat. 13, as amended, 1 U.S.C. 109, are set out in Appendix C, *infra*, pp. 19a–29a.

STATEMENT

Respondent manufactures men's, women's and children's apparel which are distributed to some 12,000 retail outlets located throughout the world (R. 25, 66). On September 4, 1958, respondent was charged by the Federal Trade Commission with having violated Section 2(d) of the Clayton Act by granting discriminatory advertising and promotional allowances to certain favored customers (R. 2–4). Respondent did not answer the complaint, but consented to the entry against it of a cease-and-desist order prohibiting further discrimination in advertising and promotional allowances (R. 7–8). The agreement and order were

approved by a hearing examiner (R. 10–12), and on January 16, 1959, the order was adopted by the Commission (R. 13; 55 F.T.C. 1065).[2]

On July 23, 1959, the Finality Act of 1959, 73 Stat. 243 (pp. 23a–28a, *infra*), became effective. The Finality Act amended the third and other paragraphs of Section 11 of the Clayton Act—which had provided for judicial enforcement of Commission orders only after they were once disobeyed—by establishing a new procedure whereby cease-and-desist orders issued by the Commission become final when affirmed on review in appellate courts or at the expiration of the time in which review may be sought. Violations of final orders are punishable by a civil penalty of up to $5000 per day for each offense, collectible in actions in the district courts. The 1959 Act made no explicit provision for cease-and-desist orders entered prior to 1959 other than those which were being litigated in appellate courts under the former procedures at the time of the statute's enactment.

On July 22, 1964, the Commission ordered an investigational hearing into charges that respondent had violated the 1959 consent order by granting discriminatory advertising and promotional allowances (R. 20–21). Respondent stipulated before a hearing examiner that it had violated the consent order by granting discriminatory allowances to customers in Chattanooga, Tennessee, and in Brooklyn, New York, and that the payments to these and "other favored cus-

[2] An inadvertent error in terminology appearing in the Commission's decision and order was subsequently corrected on joint motion of the parties (R. 15–16).

tomers" had not been made available on proportionally equal terms to all its other customers competing in the distribution of Jantzen products, as required by the cease-and-desist order (R. 66–68). The hearing examiner issued his report and certification to the Commission (R. 25–31). On April 12, 1965, after considering the entire record including the admissions in the stipulation, the Commission concluded that respondent's acts and practices violated the order (R. 61–64).

On April 23, 1965, the Commission applied, under the provisions of the third paragraph of Section 11 of the original Clayton Act, to the Court of Appeals for the Ninth Circuit to enforce the cease-and-desist order. The court of appeals sustained respondent's contention that the Commission's petition should be dismissed for lack of jurisdiction. The court held that the 1959 amendment repealed the authority of the Commission and the courts to enforce, under the former procedures, unreviewed cease-and-desist orders entered by the Commission before its effective date.

REASONS FOR GRANTING THE WRIT

The court of appeals held in this case that Congress in 1959 deprived the Federal Trade Commission of the power to obtain judicial enforcement of nearly 400 orders which were then outstanding and which had been issued by the Commission pursuant to its statutory duty to enforce provisions of the Clayton Act. This conclusion is, we submit, contrary to the obvious intent of the Congress which passed the Fi-

nality Act of 1959. It conflicts with the prevailing understanding of the Finality Act's effect and with the rule of construction established by the General Savings Statute, 1 U.S.C. 109. The decision has substantial practical significance for both the Commission and those subject to its pre-1959 Clayton Act orders.

1. The Commission was authorized by Section 11 of the Clayton Act to enforce compliance with various provisions of the Act by issuing cease-and-desist orders when, pursuant to appropriate proceedings, it found that the enumerated provisions had been violated. Prior to 1959, Section 11 provided no immediate sanction for the violation of such an order. Only after the Commission found that its order had been violated—*i.e.*, that, in addition to the violation giving rise to the order, the respondent had committed a second violation—could it, under the pre-1959 procedures, obtain a court order directing the respondent to comply with the Commission's order. See, *e.g.*, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470. Under this procedure, a respondent was subject to no direct sanction until his third violation, which was punishable by contempt proceedings.

The legislative history of the Finality Act of 1959 demonstrates conclusively that Congress' only intent was to provide a more effective method of enforcement. Experience had shown that the simpler enforcement procedures prescribed by the Wheeler-Lea Amendment of 1938 to Section 5 of the Federal Trade Commission Act, 52 Stat. 111, were more efficient. In the Finality Act, Congress adopted provisions almost identical to those in the 1938 Act. The title of the

Act plainly stated its purpose: "To amend Section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder * * *." This purpose was reflected in the legislative reports (S. Rep. No. 83, 86th Cong., 1st Sess. and H. Rep. No. 580, 86th Cong., 1st Sess.) and in the discussion on the floor of Congress (105 Cong. Rec. 12729–12735, 12810–12811, 12974, 13221).[3] The legislative history provides no support for any inference that Congress wished to weaken or reduce the Commission's powers with respect to its then outstanding orders. The decision below has that effect, however, because it construes the Finality Act as depriving the Commission of the sole avenue by which it could impose sanctions for violations of its orders—*i.e.*, by instituting enforcement actions in courts of appeals.

While recognizing that Congress' failure in 1959 to provide expressly for outstanding orders may have been "inadvertent" (p. 13a, *infra*), the court below concluded that "Congress may well have felt that this [*i.e.*, the elimination of enforcement procedures for pre-1959 orders] was a better disposition of old cases than to perpetuate the old system as to old orders" (p. 15a, *infra*). But since Congress provided no express substitute for the "old system" in 1959, the result of the court's speculation regarding Congress'

[3] Senator Sparkman, who introduced S. 726, 86th Cong., 1st Sess., which became the Finality Act, explained "* * * that the bill in nowise proposes any deviation from the original intent of Congress when it enacted the Clayton Act and the Federal Trade Commission Act." 105 Cong. Rec. 4465. See also 105 Cong. Rec. 12730, 12732–12733.

intent is to leave the Commission with no alternative other than to write off its pre-1959 orders and proceed anew against the respondents named therein. It is most unlikely, we submit, that Congress wished to relegate the Commission to new proceedings—in which the maximum penalty for violation of an unreviewed final order would be a civil fine—in cases where, before the passage of the Act, the respondents were subject to judicial decrees if they violated cease-and-desist orders entered against them. The threat of judicial enforcement is a meaningful deterrent, for a contempt sanction may fall heavily upon a corporate respondent and its officers. See, *e.g., In re Holland Furnace Co.,* 341 F. 2d 548 (C.A. 7), certiorari denied in part, 381 U.S. 924, affirmed in part, *sub nom. Cheff* v. *Schnackenberg,* No. 67, O.T., 1965, decided June 6, 1966. While it is doubtless true, therefore, that the pre-1959 procedure was unwieldy, it nonetheless armed the Commission with a deterrent against repeated violations which Congress should not be presumed to have silently withdrawn.

2. Nor does the language of the 1959 amendments compel the result reached by the court below. While it is true that the Finality Act substituted new procedures for those governing judicial review under former Section 11 of the Clayton Act, it did not explicitly deny the Commission the power to act with respect to existing orders in accordance with authority previously conferred. The language which effected the substitution of procedures is "[t]he third, fourth, fifth, sixth, and seventh paragraphs of such section

[Section 11 of the Clayton Act] are amended to read as follows: * * *" (p. 24a, *infra*). The words "are amended to read as follows," like any other terms in a statute, must be read in light of "common-sense, precedent, and legislative history." *United States* v. *Standard Oil Co.*, No. 291, O.T., 1965, decided May 23, 1966, slip opinion, p. 2. These standards all support a reading of the Finality Act which would give its substitution of remedies prospective effect only and would preserve the pre-existing procedures in cases involving pre-1959 orders. Such a construction would be consistent with the purpose of Congress, which was to strengthen, rather than weaken, the enforcement of Commission orders under the Clayton Act, and it would prevent the unreasonable result "plainly at variance with the policy of the legislation as a whole" (*Ozawa* v. *United States*, 260 U.S. 178, 194, quoted in *United States* v. *American Trucking Associations*, 310 U.S. 534, 543) which would follow from literal adherence to the words of the Finality Act. See also *Cabell* v. *Markham*, 148 F. 2d 737 (C.A. 2), affirmed, 326 U.S. 404, and authorities there cited; cf. *Federal Trade Commission* v. *Dean Foods Co.*, No. 976, O.T., 1965, decided June 13, 1966.

The construction rejected by the court below would also accord with the expressed understanding of this Court and the Court of Appeals for the District of Columbia Circuit regarding the effect of the 1959 Finality Act. In *Sperry-Rand Corp.* v. *Federal Trade Commission*, 288 F. 2d 403, the District of Columbia Circuit held that the new finality provisions did not apply to pre-amendment orders, noting that "[e]nforcement due to any violation of the consent order

which might occur is left to the provisions of the statute as they existed at the time the order was entered." 288 F. 2d at 406. And in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, this Court observed, with respect to a pre-1959 order, that the only sanction available was that following from "violation of an enforcement order yet to be entered by an appropriate Court of Appeals * * *." 368 U.S. at 365.[4]

3. Moreover, even if the amending language of the Finality Act were read to repeal the pre-existing jurisdictional provisions, the General Savings Statute, 1 U.S.C. 109, would preserve the jurisdiction of the courts and the authority of the agency to enforce pre-1959 orders. That statute—enacted in 1871 (16 Stat. 432) and appearing as Section 13 of the Revised Statutes—provides (pp. 28a–29a, *infra*) that "[t]he repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statue shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such * * * liability." Respondent was charged by the Commission with having incurred a liability in 1958 by violating the Clayton Act. Such a violation, under the then applicable law, meant that

[4] This Court did not advert to the circumstance, on which the court below relied (p. 12a, *infra*), that "the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act" so as to fall within the exception provided by Section 2 of the Finality Act. That was not, we submit, the basis of this Court's observation in *Broch*.

respondent could be directed to cease and desist by a Commission order which, if violated, could be enforced by a court.[5] The Commission's 1964 proceeding was, within the meaning of the General Savings Statute, a "proper action" for the enforcement of that liability, even though the Commission was also required to prove acts committed after the underlying statute had been amended. The court below erred in assuming that the proceeding instituted before it by the Commission was based entirely "on further violations occurring *after*" the adoption of the Finality Act in 1959 (p. 15a, *infra*). Although proof of those violations was a necessary condition for the grant of the relief requested by the Commission, the action was, in fact, the Commission's only means of carrying out the sanction which made its earlier order meaningful. If, on the other hand, the court below were correct in its application of the statute, the liability incurred in 1958 would be "extinguish[ed]" because no action to effectuate the Commission's remedy could ever be brought.

In *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, this Court held under the General Savings Statute that outright repeal of the War Risk Insurance

[5] An order of an administrative agency is a "liability" within the meaning of the General Savings Statute, even though there is no sanction for violation of such an order until it has been judicially enforced. See *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233 (C.A. 8), certiorari denied, 334 U.S. 845; *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131 (C.A. 4); *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908; *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485 (C.A. 6).

Act did not extinguish the government's preexisting liability or deprive the district courts of jurisdiction to enforce that liability. "[T]o strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and tends to defeat rather than further the legislative purpose." 344 U.S. at 390. The decision of the court below has the effect condemned in the *De La Rama* case because it deprives the courts of jurisdiction to enforce the only meaningful "liability" imposed by Section 11 of the Clayton Act prior to its amendment.

4. The decision below is of substantial legal and commercial importance. We are informed by the Commission that there are 438 pre-amendment orders under the Clayton Act now outstanding. Excluding those which were pending in or decided by the courts of appeals prior to the amendment, some 388 currently outstanding orders are affected by this case.[6] The status of these orders is of substantial concern to the respondents, to their competitors, and to the various industries in which they are involved.[7]

[6] This figure represents orders entered in separately docketed cases. A single docket may include more than one respondent firm. A preliminary check of a standard reference work confirms the continued existence of at least 336 separate corporate respondents.

[7] Among the major firms subject to recent orders are: *Benrus Watch Company, Inc.*, 49 F.T.C. 476 (1952) (Sec. 2(a), watches); *Goodyear Tire and Rubber Co., Inc.*, 50 F.T.C. 143 (1953), (Sec. 2(a), shoe soles and heels); *Helena Rubinstein, Inc.*, 52 F.T.C. 1267 (1956) (Sec. 2(d), 2(e), cosmetics); *General Foods Corp.*, 52 F.T.C. 798 (1956) (Sec. 2 (d) (e), food products); *The Borden Company*, 54 F.T.C. 563 (1957) (Sec. 2(a), milk products; *Schick Incorporated and Schick Services, Inc.*, 55 F.T.C. 665 (1958). (Sec. 2, Clayton Act and Sec. 5, Federal Trade

Among the affected orders are four which prohibit specified acquisitions under the anti-merger provisions of Section 7, forty-five which bar exclusive dealing arrangements in violation of Section 3, and one hundred and fifty which correct illegal price discrimination in violation of Section 2(a).

The court of appeals' assertion that its decision will not have any significant effect because the Commission may simply enter new orders if respondents violate pre-1959 orders (p. 15a, *infra*) is unsound. Proof of new violations of the statute may require relitigation of issues which have previously been resolved by consent or after an evidentiary hearing.[1] Enforcement under the old procedure, on the other hand, is not aimed at proving a second violation of the *statute*, but at proving a violation of the terms of the *order*. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54. In addition, the prohibitions contained in the Commission's orders need not be limited to prohibitions of the particular conduct which

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Commission Act, shaving products); *Ronson Corp.*, 55 F.T.C. 1017 (1959) (Sec. 2, Clayton Act and Sec. 5, Federal Trade Commission Act, tobacco lighters); *Sunkist Growers, Inc.*, 54 F.T.C. 1964 (1958) (Sec. 2(d), produce); *Piel Bros., Inc.*, 54 F.T.C. 1526 (1958) (Sec. 2(d), beer); *Libby-Owens-Ford Glass Co.*, 53 F.T.C. 1038 (1957) (Sec. 2(a), automotive safety glass). *International Paper Company*, 53 F.T.C. 1192 (1957) (paper); *Union Bag and Paper Corp., et al.*, 52 F.T.C. 1278 (1956) (packaging material); *The Vendo Co.*, 54 F.T.C. 253 (1957) (bottle vending machines); *Automatic Canteen Co. of America*, 54 F.T.C. 1831 (1958) (vending machines).

[1] *Res judicata* would obviously be unavailable in the case of consent orders. Whether it would bar relitigation of a defense in a case in which a respondent had failed to seek judicial review—which was, under the pre-1959 procedure, available without time limit—is uncertain.

led to the original offense, but may include similar commercial practices which might not otherwise be unlawful. Typical orders under Section 2(a) remedying unlawful price discrimination at the secondary line of competition have, since 1948, flatly prohibited further discriminations, without referring to injury to competition or requiring proof of it. *Federal Trade Commission* v. *Morton Salt Co., supra* at 54. Orders under Section 3 typically prohibit *any* arrangement barring customers from dealing in competitor's products, making it unnecessary to prove the statutory element of competitive injury. Finally, this Court has made clear that respondents are estopped from basing defenses and justifications in an enforcement proceeding upon facts which they had an opportunity to present in the original proceeding. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 476–477. It is unclear whether this rule would apply if a *de novo* proceeding had to be instituted.

Paramount is the fact that in the Commission's view the availability of the remedy provided by the pre-1959 statute for violation of Commission orders acts as a significant deterrent to violations of such orders, and that the withdrawal of this deterrent by the decision below may hinder enforcement of the Clayton Act. This Court has observed that the Commission, not the courts, has been assigned the task of "develop[ing] that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy * * *." *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413.

The Commission believes that the decision below unduly restricts its mandate in that regard and that a resolution of the issue presented by this case is necessary to enable it to plan its future program for enforcement of the Clayton Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1966.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20021

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC., RESPONDENT

February 4, 1966

Petition to Enforce an Order of the Federal Trade Commission

Before POPE, JERTBERG, and DUNIWAY, *Circuit Judges*

DUNIWAY, *Circuit Judge:*

The Federal Trade Commission seeks enforcement of a cease and desist order, issued by it on January 16, 1959 (55 F.T.C. 1065) and modified on March 26, 1959.[1] No proceedings relating to the order were begun by either party in this court or any court until the present petition was filed on April 22, 1965. It arises from a proceeding begun by the Commission

[1] The order was issued pursuant to a written consent, whereby Jantzen waived any further procedural steps, the making of findings of fact and conclusions of law, and all right to contest the validity of the order.

on July 22, 1964, based upon the Commission's belief that Jantzen might not be complying with the order. At a prehearing conference on November 23, 1964, Jantzen admitted certain violations of the order. At the same time Jantzen took the position (1) that the order is invalid and (2) that, if it is valid, there is no method provided by law for its enforcement. It presents the same contentions here. We hold that we have no jurisdiction in this proceeding, and therefore do not pass upon the first question.

The cease and desist order followed the filing of a Commission complaint that charged violation of Section 2(d) of the Clayton Act, 38 Stat. 730 (1914) as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) 1964). The Commission was authorized to issue such an order by Section 11 of the Clayton Act, 38 Stat. 734 as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 21 (1958). We therefore refer to it as a "Clayton Act order," to distinguish it from orders issued by the Commission in the course of its duty to enforce the Federal Trade Commission Act, 38 Stat. 717, 719, § 5 (1914), 15 U.S.C. § 45, as amended. We refer to these as F.T.C. Act orders.

Until 1938, the method of enforcing both types of orders was essentially the same. Section 11 of the Clayton Act, *supra*, as it read when the order here involved was issued, contained 7 paragraphs. The first authorized the Commission to enforce, *inter alia*, section 2. The second set up a procedure for the issuance by the Commission and service of a complaint for a hearing, and, upon finding violation, for the issuance of a cease and desist order. The third dealt with enforcement of such an order, and read, in pertinent part, as follows:

> "If such person fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may

apply to the United States Court of Appeals * * * for the enforcement of its order * * *. [T]he court * * * shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission * * *. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *." (64 Stat. 1127–8)

The fourth gave the respondent a similar right to petition the Court of Appeals for review of the order, without limit as to the time within which to do so. The remaining 3 paragraphs are not material to our problem.

Section 5 of the Federal Trade Commission Act, *supra*, contained, in its third, fourth and fifth paragraphs, substantially identical provisions regarding F.T.C. orders.

No penalty attached to the violation of either type of order. In order to obtain an enforcing order in the Court of Appeals, a second violation had to be shown. This was done, as in this case, by the Commission's ordering an investigation, appointing a hearing officer, and, usually, holding a hearing.[2] (See the Commission's Rules at 16 C.F.R. § 1.35.) If a violation was found, the Commission then sought enforcement in the Court of Appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. Such a decree had the force of an injunction, and, if thereafter the Commission found further violation, it could bring the respondent before the court for punishment for contempt.

Not surprisingly, this very clumsy and time consuming procedure was severely criticized, and in 1938

[2] A hearing was not necessary here, because of Jantzen's admissions and stipulation of violation at a pre-hearing conference.

the Congress responded by adopting the Wheeler-Lea Act, 52 Stat. 111, section 3 of which (52 Stat. 111–114) amended section 5 of the Federal Trade Commission Act. That section (3) states: "Section 5 of such Act * * * is amended to read as follows: * * *." The amended section contains 12 paragraphs designated (a) through (*l*). Paragraph (b) retains substantially the same provision for the issuance of cease and desist orders as was contained in the old third paragraph. Paragraph (c), however, is different. It provides for a petition by the respondent to the Court of Appeals for review of the order. The petition must be filed within sixty days from the date of service of the order. The court has similar powers to those conferred by the old section, but with the added power to decree enforcement. In general, the new paragraph (c) is comparable to the old fifth paragraph of the section (38 Stat. 720). The former fourth paragraph, providing for a petition by the Commission, is omitted. Paragraphs (g), (h), (i), and (j) provide for the finality of Commission orders—either when the period in which to petition for review expires or, if there be such a petition, then within a fixed time after the completion of subsequent court and Commission proceedings. All of this is new, as is paragraph (*l*). It subjects violators of final orders to "a civil penalty of $5000 for each violation." This has been since amended (64 Stat. 21, 1950) to provide that each separate violation shall be a separate offense, and, if the violation is a continuing one, each day of its continuance is a separate offense.

The normal rule is that when an Act amends a previous Act "to read as follows" this is as much an express repeal of those provisions which are

omitted[3] as it is an express enactment of those provisions which are added and a continuation in effect, rather than a repeal and new enactment, of those provisions which remain unchanged.

No doubt in recognition of this rule, the Wheeler-Lea Act deals with its effect on pending cases. Section 5(a) of the amending Act reads:

> "(a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5(c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act." (52 Stat. 117)

Thus, if the order before us were an F.T.C. order, we would have no problem. The order would be final and enforcible via the civil penalty route, and the Commission would not be here.

But Clayton Act orders were not affected by the Wheeler-Lea Act. They are, however, affected by the so-called Clayton Finality Act, 73 Stat. 243

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[3] No doubt the Congress could add to each such amending statute a provision that "everything omitted by this Act from the statute (or section) that is hereby amended is hereby repealed," or other words to like effect, but the law does not require such laborious absurdities. See *Heinze* v. *Butte & Boston Consol. Mining Co.*, 9 Cir., 1901, 107 Fed. 165, 167; *United States* v. *Kelly*, 9 Cir., 1899, 97 Fed. 460, 462; *United States* v. *Baker*, 3 Cir., 1961, 293 F. 2d 613, 617–18; *H. Rowe Co.* v. *Crivella*, 8 Cir., 1939, 105 F. 2d 434, 436; *Rowan* v. *Ide*, 5 Cir., 1901, 107 Fed. 161; *Columbia Wire Co.* v. *Boyce*, 7 Cir., 1900, 104 Fed. 172, 174; Endlich, *Interpretation of Statutes*, § 196 (1888); Crawford, *Statutory Construction* §§ 304, 305, (1940); 1 Sutherland, *Statutory Construction* § 1932 (3d ed. 1943); 82 C.J.S. Statutes, § 294, pp. 503–4; *cf. Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 502–6; *Murdock* v. *City of Memphis*, 1875, 87 U.S. (20 Wall.) 590, 617; *Stewart* v. *Kahn*, 1870, 78 U.S. (11 Wall.) 493, 502.

(1959); 15 U.S.C. § 21 (1964). In substance, it does for Clayton Act orders what the Wheeler-Lea Act did for F.T.C. orders. The technique of amendment is the same. It provides, in pertinent part:

> "(a) the first and second paragraphs of section 11 of the [Clayton] Act * * * are hereby redesignated as subsections (a) and (b) of such section, respectively."

It then adds a sentence to the second paragraph, which it designates as (b), dealing with proceedings before the Commission leading to issuance of a cease and desist order. It continues:

> "(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:
>
> (c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside * * *." (73 Stat. 243)

It is unnecessary to reproduce the balance of the amended section. It is almost verbatim the same as section 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act. The effect of the statute is to produce a revised section 11 of the Clayton Act, containing 12 paragraphs designated (a) through (*l*), and providing the same method of review at the instance of the respondent only, the same power of the court, the same time limitation, the same rules as to finality, and the same civil penalties for violations as does amended section 5 of the Federal Trade Commission Act.

The former third paragraph which we have quoted in part earlier in this opinion is omitted in its entirety. That is the paragraph which provided for the type of proceeding to enforce, brought here by the Commission, that is now before us. For reasons already stated, we are of the opinion that the amendment, by omitting the third paragraph, repealed it.

Like the Wheeler-Lea Act, the Finality Act contains a paragraph relating to prior cases, which reads:

> "SEC. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act." (73 Stat. 245–46)

It will be noted that, unlike the corresponding section 5(a) of the Wheeler-Lea Act, this section does not deal with cease and desist orders issued before its effective date, nor provide for their becoming final within the meaning of the amended Act. It deals solely with proceedings begun in a Court of Appeals, which is the subject to which the former third and fourth paragraphs related. Thus the third paragraph is expressly continued in effect for this very limited purpose, namely, the completion of proceedings for enforcement initiated by the Commission in a Court of Appeals. To us, this is a strong indication that the Congress knew, and intended, that it was repealed for other purposes. The Finality Act is closely modeled on the Wheeler-Lea Act, which makes the

difference between section 2 of the Finality Act and section 5(a) of the Wheeler-Lea Act even more significant.

It is significant, too, we think, that immediately after the adoption of the Finality Act, the Commission itself took the position that existing Clayton Act orders would become final within 60 days, under the new law, just as under the Wheeler-Lea Act, even though the Finality Act does not contain the language to that effect that appears in section 5(a) of the Wheeler-Lea Act. The Court of Appeals for the District of Columbia Circuit refused to accept this view. *Sperry Rand Corp.* v. *FTC*, 1961, 288 F. 2d 403; *Schick Inc.* v. *FTC*, 1961, 288 F. 2d 407; *FTC* v. *Nash-Finch Co.*, 1961, 288 F. 2d 407. In its briefs in those cases, the Commission strongly urged that the former enforcement procedure, which it now seeks to invoke, was no longer in effect.

The Commission's present position is directly contrary to the position that it took then. This does not necessarily mean that its present view is wrong.* It relies, first, upon the established rule of statutory construction, that repeals by implication are not favored. That rule, however, does not apply here. As we have already indicated, we think that the repeal in this

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*We think that it does mean, however, that we owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute, the adoption of which it helped to procure. (*Cf. FTC* v. *Mandel Bros., Inc.*, 1959, 359 U.S. 385, 391; *Norwegian Nitrogen Prods. Co.* v. *United States*, 1933, 288 U.S. 294, 315.)

case was express. (See also, *Sperry Rand Corp.* v. *F.T.C., supra.*)[5]

It next urges that the purpose of the Clayton Finality Act was to establish, for Clayton Act orders, the same method of enforcement as was already applicable under the Wheeler-Lea Act to F.T.C. orders. There is no doubt that that was the purpose.[6] There

[5] Of the five cases principally relied upon by the Commission, three are not even closely in point. Each deals with a supposed conflict between two separate statutes or sections, adopted or amended at different times, not with a statute expressly amending a particular statute or section to read in a different way. (*Mercantile Nat'l Bank* v. *Langdeau*, 1963, 371 U.S. 555, 565–67; *United States* v. *Borden Co.*, 1939, 308 U.S. 188, 198–201; *Liets* v. *Flemming*, 6 Cir., 1959, 264 F. 2d 311, 313.) Two others are more closely in point, but do not involve the effect of the omission, in the amending statute, of a provision that was contained in the same statute before the amendment. They both hold that, insofar as former language is retained in the amended section, there has not been a repeal and a new enactment, but only the continuance in effect of the old provisions that are thus retained. (*Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 506; *Rithole* v. *March*, D.C., Cir., 1939, 105 F. 2d 937.) *Rithole* is the converse of this case. It deals with the Wheeler-Lea Act, and holds that, because the portion of section 5 of the Federal Trade Commission Act authorizing the Commission to issue cease and desist orders was retained in the amended section, there was no repeal and new enactment of that portion, but that it continued in effect. We quite agree, but that does not answer the question here posed.

[6] The title of the Clayton Finality Act reads:

"AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes." (73 Stat. 243)

The House Report accompanying the Act, H.R. Rep. No. 580, 86th Cong., 1st Sess. 4, quoted in *FTC* v. *Henry Broch & Co.*, 1962, 368 U.S. 360, at 365–66 n. 6, says:

"The Clayton Act, in its present enforcement procedures, permits a person to engage in the same illegal prac-

is also no doubt that, as to future orders, that purpose was fully accomplished. But it is equally clear, as we have already shown, that the Congress dealt with orders already outstanding in a different manner in the two Acts. In the case of F.T.C. Act orders, it made the new remedy fully applicable to existing orders. In the case of Clayton Act orders, it did not do

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tices three times before effective legal penalties can be applied as a result of action by the commission or board vested with jurisdiction. First, in order to issue and serve a cease-and-desist order initially, the commission or board must investigate and prove that the respondent has violated the prohibitions of the Clayton Act. No provision of the Clayton Act, however, makes the commission or board's cease-and-desist order final in the absence of an appeal by the respondent for judicial review. At the present time, the Clayton Act contains no procedure by which the commission or board may secure civil penalties for violations of its orders.

"Second, before the commission or board may obtain a court ruling that commands obedience to its cease-and-desist order, it must again investigate and prove that the respondent has violated both the order and the Clayton Act. The jurisdiction of the court of appeals, under the present provisions of Clayton Act section 11, cannot be invoked by the commission or board unless a violation of the cease-and-desist order is first shown.

"Third, enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the court's order. This entails a third hearing before the commission and a review thereof by the court of appeals.

"In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders issued thereunder are much simplier and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time."

this. Instead, it expressly preserved the old methods, but only as to a limited class of such orders.

The Commission says that it has case authority for its position. It cites two cases in which enforcement of a pre-Finality Act order was decreed, without opinion: *FTC* v. *Pacific Gamble Robinson Co.*, 9 Cir., 1962, No. 18260, not reported, and *FTC* v. *Benrus Watch Co.*, 2 Cir., 1962, No. 27752, not reported. The order was not opposed in either case. These cases are not authority on the question.[7] It also cites two cases involving investigations by it to determine whether pre-Finality Act orders were being obeyed: *Wanderer* v. *Kaplan*, D.D.C., 1962, CCH Trade Cases, ¶70,535; *Nash-Finch Co.* v. *FTC*, D. Minn., 1964, 233 F. Supp. 910. Neither of these cases involved the jurisdiction of a Court of Appeals to enforce such an order. Such dicta as they contain is hardly authoritative on the question.

Next, it cites dicta in *Sperry Rand Corp.* v. *FTC*, *supra*,[8] and language in *FTC* v. *Henry Broch & Co.*, *supra*, fn. 6.[9] It is perfectly clear that the question

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[7] *Brown Shoe Co.* v. *United States*, 1962, 370 U.S. 294, 307; *Cross* v. *Burke*, 1892, 146 U.S. 82, 87.

[8] There the court said:

"Enforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered. It follows that the basis for the relief sought, namely, review of the order of November 3, 1958, and of the order of the Commission denying petitioner's motion to modify or set aside the order of November 3, 1958, disappears." (288 F. 2d at 406–7)

[9] The language relied on is:

"In considering *Broch's* challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply

here presented was not before the court in either case. We have already discussed *Sperry Rand Corp.* The *Broch* case also involved a pre-Finality Act order, issued December 10, 1957. The respondent petitioned for review, and the Seventh Circuit set the order aside on December 11, 1958 (*Henry Broch & Co.* v. *FTC,* 261 F. 2d 725). The Commission sought and obtained certiorari, and the Supreme Court reversed on June 6, 1960 (*FTC* v. *Henry Broch & Co.,* 1960, 363 U.S. 166). On remand, the Seventh Circuit modified the order, and affirmed it as modified on November 3, 1960 (*Henry Broch & Co.* v. *FTC,* 285 F. 2d 764). The Commission again sought certiorari, and again the Supreme Court granted it, and reversed (368 U.S. 360). Thus, when the Finality Act was passed in 1959, the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act. It falls squarely within the language of Section 2 of the Finality Act, and the Supreme Court's language, as applied to it, is clearly correct. As applied to this case, which does not fall within Section 2, the language is not even applicable dictum.

Finally, the Commission asserts that, unless its views are accepted, "forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist

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to enforcement of the instant order. In consequence, Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. *Federal Trade Comm'n* v. *Ruberoid Co.,* 343 U.S. 470, 477–480." (368 U.S. at 364–65)

would be wiped from the books." It urges that this result is quite contrary to the congressional intent, which was, as we have seen, to strengthen enforcement by the Commission of the Clayton Act. It says that Congress "did not intend to grant amnesty to the almost 400 law violators under order." To these arguments there are two answers, one legal, the other practical.

The legal effect of the Commission's argument is to ask us to insert into the Finality Act something that is not there. In *Sperry Rand Corp., supra,* the Commission asked the court, in substance, to insert into the Finality Act the provisions of section 5(a) of the Wheeler-Lea Act. Indeed, it had tried to accomplish the same thing by press release. The court quite properly declined to do what the Commission asked. (See 288 F. 2d at 406.) What we are now asked to do, in substance, is to insert into section 2 of the Finality Act a provision making it applicable to outstanding cease and desist orders as to which proceedings had *not* been initiated, before the date of enactment, under the third and fourth paragraphs of the former section 11 of the Clayton Act, and this in spite of the fact that the section applies only where such proceedings, *have* been initiated. Whether the omission of such a provision was intentional, as it may have been, or inadvertent, as it may also have been, is immaterial. It is not the business of courts, under the guise of construction, to put into a statute what Congress has left out.[10]

The practical answer to the Commission's argument is clear. The Commission is indulging in hyperbole. We do not, by our holding, wipe forty-five

[10] *Hanover Bank* v. *Commissioner*, 1962, 369 U.S. 672, 677–678; *Iselin* v. *United States*, 1926, 270 U.S. 245, 251; *Ebert* v. *Poston*, 1925, 266 U.S. 548, 554.

years of Clayton Act enforcement and almost 400 orders to cease and desist from the books, nor do we grant amnesty to any law violator, much less to 400. The orders are still there, and still as valid as they ever were. Part of the Commission's function has always been to educate and to persuade. The orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were. There is a presumption that people obey the law; we would suppose that it applies to obedience to FTC orders. The fact that there are 400 orders outstanding from forty-five years of enforcement, none of which the Commission has yet sought to enforce, is somewhat persuasive that the presumption is a valid one.

Morover, as the Commission points out in its brief, the former enforcement procedures were "somewhat inadequate," since "no meaningful sanctions were provided for enforcement of cease and desist orders." The Commission says:

> "Senator Sparkman, speaking on the floor of the Senate in 1957, commented (103 Cong. Rec. 690): 'In this light it is readily understandable why contempt proceedings to enforce a Clayton Act order have been successful only twice since 1940.' "

See also fn. 6, *supra*. We cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement,[11] with its requirement

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[11] The Commission, in its brief, says that the system that it here seeks to perpetuate was characterized, in Congressional hearings as "ineffectual; cumbersome; lacking teeth; awkward, slow and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic," and its enforcement of its orders under that system as "handicapped, hampered and weakened," leaving the Commission

that three successive violations be found before one can be punished. (*FTC* v. *Ruberoid Co.*, 1952, 343 U.S. 470). All that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order. Such an order will give the Commission the full benefit of the Finality Act, and after only two bites at the apple instead of three. Congress may well have felt that this was a better disposition of old cases than to perpetuate the old system as to old orders. This, we think, is the result of what Congress did.

In its reply brief, the Commission suggests, for the first time, in a footnote, that the General Savings Statute, 61 Stat. 635 (1947), 1 U.S.C. § 109, preserves the remedy that it seeks.[12] We think not. This proceeding is not based upon a violation that occurred *before* the Finality Act was adopted, but on further violations occurring *after* its adoption in 1960 and 1962. (See *FTC* v. *Ruberoid Co.*, *supra*.) Thus there is not here involved a "penalty, forfeiture or liability" incurred under the former statute. Here, we deal with a statute which formerly conferred jurisdiction on this court, and which, except as to a limited class of cases, of which this is not one, has

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"poorly equipped to discharge its responsibilities," and leading to "diminution of the intended purpose" of the Clayton Act. We find it not surprising that Congress did not choose to perpetuate such an obviously objectionable system. We also find it somewhat surprising that the Commission is now asking us, by a bit of judicial legerdemain, to recreate it.

[12] "§ 109. *Repeal of statutes as affecting existing liabilities.* The repeal of any statutes shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *."

been repealed. *Cf. De La Rama S.S. Co. v. United States*, 1953, 344 U.S. 386, 390. Moreover, the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method. *Cf. United States v. Obermeier*, 2 Cir., 1950, 186 F. 2d 243, 251–55, *cert. denied*, 1951, 340 U.S. 951.

The petition is dismissed for want of jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,021

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC., RESPONDENT

DECREE

Before: POPE, JERTBERG and DUNIWAY, *Circuit Judges*

This cause came on to be heard upon the petition of the Federal Trade Commission, filed April 22, 1965 to review an order of the Federal Trade Commission issued by it on April 12, 1965. The Court heard argument of respective counsel on January 14, 1966 and has considered the briefs and transcript of record filed in the cause. On February 4, 1966, the Court being fully advised in the premises handed down its decision,

In conformity thereto it is hereby Ordered, adjudged and decreed by the United States Court of Appeals for the Ninth Circuit that the petition to review in above cause be and hereby is dismissed for want of jurisdiction.

A true copy:

Attest: April 14, 1966,

WILLIAM B. LUCK, *Clerk,*

By:

WILLIAM E. WILSON, *Chief Deputy.*

Filed Feb. 4, 1966.

WM. B. LUCK, *Clerk.*

APPENDIX C

1. Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (1958 ed.) 21 provided prior to July 23, 1959, as follows:

> Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by

the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall file the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the application the court shall cause notice thereof to be

served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission or Board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court

to the Commission or Board and thereupon the Commission or Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, determined as provided in section 1009(e) of Title 5, shall in like manner be conclusive.

Upon the filing of the record with it the jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise, relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said

complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

2. The Finality Act of 1959, Public Law 86-107, 73 Stat. 243 [15 U.S.C. 21], provides:

AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the first and second paragraphs of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21), are hereby redesignated as subsections (a) and (b) of such section, respectively.

(b) The last sentence of the second paragraph of such section which has been hereby redesignated as subsection (b) is amended to read as follows: "Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it

under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:

"(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the

question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

"(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

"(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorised by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

"(g) Any order issued under subsection (b) shall become final—

"(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed,

or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

"(3) upon the denial of a petition for certiorari, if the order of the commission or board has been affirmed or the petition for review has been dismissed by the court of appeals; or

"(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

"(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a re-

hearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

"(k) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a a separate offense."

Sec. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as

they existed on the day preceding the date of enactment of this Act.

3. The General Savings Statute, R.S. 13, as amended, 1 U.S.C. 109, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S MEMORANDUM IN OPPOSITION

The petition raises no issue worthy of review by this Court. The court of appeals refused to rewrite an unambiguous statute to reinstate "so poor a method of enforcement" (Pet. 14a) which Congress had abandoned. Repeal of the old method did not weaken

Clayton Act enforcement;[1] the new statute provides "what the Commission says is a better method" (Pet. 16a).

The court of appeals' decision is correct. Repeal is clear on the face of the statute,[2] as the Commission recognized at the time of enactment.[3] There is no reason to suppose that Congress intended anything other than what it so obviously accomplished:

a. abolition of a cumbersome procedure with substitution of a more expeditious one, and

b. preservation of the old procedure in a limited category of cases,—those in which, by reason of the previous initiation of a review or enforcement proceeding, an investment had already been made by litigants and the courts.

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[1] See letter of Commissioner Elman of June 23, 1966, to Senator Sparkman, Chairman of the Senate Select Small Business Committee, set out as Appendix A to this memorandum. The letter was released to counsel for respondent by Senator Sparkman.

[2] 1 U.S.C. § 109 has no application here. That statute, which does not apply to this case in which jurisdiction has been expressly withdrawn by Congress except as to a specific class of proceedings, was "meant to obviate mere technical abatement" arising from amendment and repeal of a substantive prohibition (*Hamm* v. *Rock Hill*, 379 U.S. 306, 314 (1964); Comment, 54 Georgetown L.J. 173 (1965)). Furthermore, Jantzen had incurred no "penalty, forfeiture or liability" under the repealed statute. The Clayton Act order against Jantzen was not judicially enforcible until violated. The violations occurred *after* enactment of the Finality Act. Thus, in 1959 at the time of repeal of the court of appeals' jurisdiction, Jantzen had incurred no enforcement "liability."

[3] The court of appeals found that when the Finality Act was adopted, "the Commission strongly urged that the former enforcement procedure . . . was no longer in effect" (Pet. 8a).

Clayton Act enforcement will be strengthened by denying the petition for a writ of certiorari.[4]

Respectfully submitted,

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[4] Alternatively, in view of the clear statement in the opinion of the court of appeals of the reasons for its decision, this Court could meet the Commission's request by granting the writ and affirming the decision of the court below, per curiam.

APPENDIX A

FEDERAL TRADE COMMISSION
WASHINGTON 25, D. C.

June 23, 1966

Honorable John Sparkman
Chairman, Select Committee on
Small Business
United States Senate
Washington, D. C. 20510

Re: Federal Trade Commission v. Jantzen Inc.,
9th Cir. No. 20,021—FTC Docket 7247

Dear Mr. Chairman:

I do not agree with the Commission's reply of this date to your letter of June 14, 1966, and for that reason am sending you a separate reply.

It seems to me that the decision of the Court of Appeals in the *Jantzen* case has been the subject of considerable misunderstanding. It has been asserted, for example, that the *Jantzen* decision nullifies 45 years of Clayton Act enforcement; that it wipes out all of the Clayton Act orders issued by the Commission prior to 1959; that these orders were "enforceable" prior to the *Jantzen* decision, and that they are now "unenforceable"; and that under the Ninth Circuits's decision, no possible enforceable sanction remains in regard to the pre-1959 orders.

I believe that these assertions are entirely unfounded. They rest upon a misreading of the opinion of the Court of Appeals in the *Jantzen* case, and upon a failure to appreciate the enormous defects and complexities of the old enforcement procedure under the pre-1959 provisions of Section 11 of the Clayton Act. To answer the specific question you ask: I believe that it would be *more* easy and effective for the Commission to enforce pre-1959 Clayton Act orders under the procedure sanctioned by the Court

of Appeals in the *Jantzen* case than under the old pre-1959 Clayton Act procedure.

Under the old enforcement procedure, a pre-1959 Clayton Act order issued by the Commission was not final or enforceable as such. The order was "enforceable" only in the sense that it constituted the first step in a long and elaborate series of proceedings leading to the entry of a final court decree of enforcement. Under the old procedure, no penalties attached to violation of an order unless and until the Commission obtained both a judgment of affirmance *and* a decree of enforcement from a court of appeals. *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 477-80.

In order to obtain a judgment of affirmance, the Commission had to satisfy the court of appeals that its order was valid, i.e., that the decision was in accord with the law, that the findings of fact were supported by substantial evidence, that the order was within the Commission's discretion, etc. However, even after the Commission obtained judgment of affirmance, it could not obtain a decree of enforcement unless and until it showed that respondent was disobeying the order and that a second violation had occurred after the order was issued by the Commission. In order to have this latter question of fact determined, the old procedure called for the Commission to conduct a full judicial-type proceeding—in which evidence as to the alleged violation was taken before a hearing examiner, findings of fact were made by him and reviewed by the Commission, etc. In some circuits, it was the practice of the court of appeals, after finding the Commission's order to be valid and entering a judgment of affirmance, to remand the case to the Commission to hold such a judicial-type hearing on the issue of respondent's alleged second violation and to make findings and report back to the court of appeals on that issue before the court would enter a decree of enforcement. E.g., *F.T.C.* v. *Balme*, 23 F. 2d 615, 621 (2d Cir.), cert. denied, 277 U.S. 598; *F.T.C.* v. *Standard Education Society*, 86 F. 2d 692, 698 (2d Cir.);

F.T.C. v. *Herzog*, 150 F. 2d 450 (2d Cir.); *F.T.C.* v. *Baltimore Paint & Color Works*, 41 F. 2d 474, 476 (4th Cir.). The Seventh Circuit had an even stricter rule; it would not consider the validity of a Commission order and enter a judgment of affirmance until the Commission had shown a post-order violation. *F.T.C.* v. *Standard Education Society*, 14 F. 2d 947, 948. In the Ninth Circuit, there was another procedure under which the Commission acted as a special master for the court of appeals before, rather than after, seeking a judgment of affirmance. *F.T.C.* v. *Washington Fish & Oyster Co., Inc.*, 271 F. 2d 39.

The important fact about the old enforcement procedure was that a Commission order was in no sense final or enforceable until the conclusion of these complex and protracted proceedings—including a full-dress judicial-type hearing before the Commission on the issue of respondent's alleged post-order violation.

Where a Commission order was affirmed by a court of appeals, any questions of fact or law thus settled were not open in deciding whether the order had been violated and should therefore be enforced. This was made clear by the Supreme Court in the *Ruberoid* case (343 U.S. at 476-77). To the extent that a pre-1959 order is *res judicata*, its legal effect in that regard is in no way altered by the decision in the *Jantzen* case. A matter which is finally determined and becomes *res judicata* may not be relitigated in any subsequent proceedings, *de novo* or otherwise. Thus, all factual matters decided in the proceedings culminating in the issuance of a pre-1959 Clayton Act order may not be relitigated—regardless whether enforcement of the order is sought under the old procedure or through initiation of new proceedings. The *Jantzen* opinion makes emphatically clear that whatever legal effect or significance a pre-1959 Clayton Act order had, it still has. On page 11 of the slip opinion, the Court of appeals expressly stated that the legal effect and significance of pre-1959 Clayton Act orders was

in no way affected or impaired by its decision: "The [pre-1959] orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were."

What, then, would be the actual practical consequences if the *Jantzen* decision were accepted and followed? As I see them, they are all in the direction of facilitating prompt and effective enforcement of pre-1959 Clayton Act orders. As already indicated, the validity of these orders and their *res judicata* effect has in no way been altered or diminished. Nor has the Court of Appeals changed or increased the Commission's burden of proving a post-order violation after conducting a judicial-type hearing on that issue. Under *Jantzen* a respondent is entitled to such a hearing on that issue before a new order, final under the 1959 amendments made by the Finality Act, is entered by the Commission. But, in that respect, there is no difference from the old pre-1959 procedure, under which a respondent was also entitled to such a judicial-type hearing before a decree enforcing the order could be entered.

I can see no material difference in the nature and scope of the judicial-type hearing conducted by the Commission under the old procedure, when it acted as a special master for a court of appeals in trying the issue of respondent's alleged post-order violation, and that which would be required under *Jantzen* as a prerequisite for the issuance of a new and final order. The Court of Appeals clearly and unambiguously stated (slip opinion, p. 12): "All that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order. Such an order will give the Commission the full benefit of the Finality Act, and after only two bites at the apple instead of three." As a practical matter, any violation of a pre-1959 Clayton Act order which the Commission should now find will inevitably also be in violation of the Clayton

Act. It is inconceivable that the Commission should seek to obtain, or that a court would impose, penalties for violation of an outstanding pre-1959 Clayton Act order where such violation was not also prohibited by the Act.

Thus, the Court of Appeals in the *Jantzen* case has authorized a relatively simple, efficient, and economical procedure whereby the Commission, in any case where the circumstances so warrant, may replace an outstanding pre-1959 Clayton Act order with a new order subject to the provisions of the Finality Act. This could be done either by the issuance of a new complaint or by reopening the proceeding to determine whether the old order should be modified and replaced by a new, final order. (Section 3.28 of the Commission's Rules of Practice.) In such a subsequent proceeding the burden of proof resting on the Commission to prove a second violation would be exactly the same—no more and no less—as under the old pre-1959 enforcement procedure; and the nature and scope of the hearing would also be exactly the same as under the old procedure.

In sum, the *Jantzen* decision does not "wipe out" or in any respect impair the value, validity, and enforceability of pre-1959 orders. What it does do is to enable the Commission to establish a new, faster, and better procedure for enforcing such orders, saving time and money both for the Commission and respondents. If, as the Commission is seeking, the Supreme Court should reverse the decision of the Court of Appeals in *Jantzen*, the Commission would have "won" the right to go back to the old, unsatisfactory pre-1959 enforcement procedure. As the Court of Appeals pointed out in footnote 11 of its opinion, the old procedure was characterized in the hearings before Congress as "ineffectual; cumbersome; lacking teeth; awkward, slow and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic".

From the standpoint of promoting expeditious and effective law enforcement, a decision reinstating the old enforcement procedure which Congress so wisely abandoned in 1959, and precluding the establishment of a more speedy and efficient procedure along the lines indicated by the Court of Appeals in *Jantzen*, would seem to be a Pyrrhic victory. For that reason, I did not concur in the Commission's request that the Solicitor General file a petition for certiorari in the Supreme Court seeking reversal of the Court of Appeals' decision in *Jantzen*. (Enclosed is a copy of the dissenting statement which I sent to the Solicitor General.)

With best wishes,

Sincerely,

PHILIP ELMAN

Re: *FTC* v. *Jantzen*

April 12, 1966

Dissenting Views of Commissioner Elman

I cannot agree that the decision of the Ninth Circuit in this case presents a question "of great importance in enforcing the Clayton Act" warranting Supreme Court review, or that it "jeopardizes" the 400 outstanding unenforced Clayton Act orders issued by the Commission between 1914 and 1959.

The case does not appear to fall within the established standards of certiorari jurisdiction. There is no conflict of decisions requiring resolution by the Supreme Court. For the various reasons spelled out in the opinion of the Court of Appeals, the decision will not impose any practical impediments to the enforcement of the Clayton Act. Its alleged adverse effects are theoretical, abstract, and highly exaggerated.

While there are 400 outstanding pre-1959 Clayton Act orders, there have been exceedingly few enforcement proceedings arising from alleged violations of such orders. The enforcement proceedings in the last five years can be counted on the fingers of one hand. So far as the Commission knows, the respondents under such orders are generally obeying them. Another explanation for the paucity of such proceedings is the cumbersome and inadequate (see also the various other adjectives quoted in footnote 11 of the court's opinion) pre-1959 method of enforcement. But like the Court of Appeals, I "cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement."

As the Court of Appeals has pointed out, the full objectives of Clayton Act enforcement against respondents believed to be violating pre-1959 orders can be more effectively and sensibly achieved by the issuance of new complaints, instead of wasting time and money by attempting to enforce the orders through the old ineffectual method. Under either procedure the Commission must hold an adjudicative hearing to establish a violation. But by proceeding with a new complaint, the Commission avoids all of the messy problems and pitfalls of the pre-1959 procedure. An order entered after a hearing on a *new* complaint becomes final by operation of law, without the Commission's having to go to a Court of Appeals, if the respondent does not seek review in 60 days. On the other hand, a Commission finding of violation in a hearing held under the pre-1959 procedure is not final and self-executing in any case; its enforcement can be obtained only after the Commission goes to the Court of Appeals *and* satisfies the court that respondent has violated the order.

The rules and procedures governing a hearing on a new complaint are established and clear. On the other hand, a "compliance investigation" proceeding under the pre-1959 method of enforcement is so anomalous and extraor-

dinary that the Commission's Rules of Practice provide no specific guidance on how it shall be conducted. In recent years the Commission has in these proceedings established *ad hoc* ground rules designed to assure that the forms of adjudication are satisfied without impairing the investigative character and purpose of the proceeding. The reasons for this hybrid procedure lie in the peculiarities and absurdities of the pre-1959 enforcement scheme.

Under the pre-amendment Clayton Act the Commission, as a prerequisite of going to the Court of Appeals for a decree of enforcement, must satisfy the court that the respondent has violated the order. *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470. However, if the Commission's finding of violation "is made as a result of an ex parte informal investigation, there are no 'pleadings, evidence, and proceedings' within the meaning of the statute. In this event the court, if it affirms the cease and desist order and if the assertion of violation is disputed, must remand the matter to the Commission for formal proceedings on the question of whether the order has been violated. Indeed, this is the usual practice." *F.T.C.* v. *Washington Fish & Oyster Co., Inc.*, 271 F. 2d 39 (9th Cir. 1959). To avoid such remands, the Commission adopted the practice of conducting "formal" compliance investigations, not *ex parte* but with all the trappings of an adjudicatory proceeding.

It is asserted that the decision of the Ninth Circuit has the effect of "nullifying the major part of the Commission's accomplishments under [the Clayton Act] for the first 45 years of its existence." The implication is that, if the Ninth Circuit's decision stands, the lid will be off and the respondents under the outstanding 400 pre-1959 orders will start violating them with impunity. This seems to be farfetched, to put it mildly. The Commission has never before regarded the pre-1959 method of enforcement as an effective deterrent against violation of Clayton Act

orders. In fact, it kept telling Congress the opposite until some action was finally taken in 1959. How can the Commission *now* tell the Supreme Court, for purposes of getting certiorari, that the pre-1959 method of enforcement is so essential and important? If the Commission wanted Congress to preserve the pre-1959 method for enforcement of pre-1959 orders, why did it not propose a provision to that effect in the Finality Act? If, through inadvertence, neglect, or otherwise, such a provision was not included by Congress, why should the Supreme Court be asked to supply the omission? It is empty hyperbole to say that the Ninth Circuit has "wiped out" the 400 pre-1959 orders. It is more accurate to say that it has wiped out an archaic and ridiculous (see footnote 11 again) method of enforcement whose total demise the Commission should be the first to cheer.*

* In any event, the pending *Standard Motor Products* case in the Second Circuit offers the Commission an opportunity to secure a conflict of decisions—assuming it is not the better part of wisdom to accept the Ninth Circuit's interpretation of the Finality Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 76–87) is reported at 356 F. 2d 253. The opinion of the Federal Trade Commission (R. 40–43) is not yet reported.

JURISDICTION

The order of the court of appeals (R. 87) was entered on February 4, 1966. On May 5, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 1, 1966. The petition for a writ of certiorari was filed on July 1, 1966, and was granted on October 10, 1966 (R. 88). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Finality Act of 1959, which amended the procedure for review and enforcement of Clayton Act cease-and-desist orders, repealed the authority of the Federal Trade Commission to seek, and the jurisdiction of the courts of appeal to grant, affirmance and enforcement of Commission orders issued prior to the amendment.

STATUTES INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended prior to July 23, 1959, 15 U.S.C. (1958 ed.) 21, the Finality Act of 1959, 73 Stat. 243, and the General Savings Statute, Rev. Stat. 13, as amended, 1 U.S.C. 109, are set out in Appendices A–C, pp. 30–40, *infra*.

STATEMENT

Respondent manufactures men's, women's and children's apparel which are distributed to some 12,000 retail outlets located throughout the world (R. 15–16). On September 4, 1958, respondent was charged by the Federal Trade Commission with having violated Section 2(d) of the Clayton Act by granting discriminatory advertising and promotional allowances to certain favored customers (R. 1–3). Respondent did not answer the complaint, but consented to the entry against it of a cease-and-desist order prohibiting further discrimination in advertising and promotional allowances (R. 4–6). The agreement and order were approved by a hearing examiner (R. 6–8), and on

January 16, 1959, the order was adopted by the Commission (R. 9; 55 F.T.C. 1065).[1]

On July 23, 1959, the Finality Act of 1959, 73 Stat. 243, became effective.[2] On July 22, 1964, the Commission ordered an investigational hearing into charges that respondent had violated the 1959 consent order by granting discriminatory advertising and promotional allowances (R. 11–12). Respondent stipulated before a hearing examiner that it had violated the consent order by granting discriminatory allowances to customers in Chattanooga, Tennessee, and in Brooklyn, New York, and that the payments to these and "other favored customers" had not been made available on proportionally equal terms to all its other customers competing in the distribution of Jantzen products, as required by the cease-and-desist order (R. 18–19). The hearing examiner issued his report and certification to the Commission (R. 15–20). On April 12, 1965, after considering the entire record including the admissions in the stipulation, the Commission concluded that respondent's acts and practices violated the order (R. 40–43).

On April 22, 1965, the Commission applied, under the provisions of the third paragraph of Section 11 of the original Clayton Act, to the Court of Appeals for the Ninth Circuit to affirm and enforce the cease-and-desist order (R. 68). The court of appeals sustained respondent's contention that the Commission's

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[1] An inadvertent error in terminology appearing in the Commission's decision and order was subsequently corrected on joint motion of the parties (R. 10).

[2] For a full discussion of the changes made by this Act, see pp. 6–14, *infra*.

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petition should be dismissed for lack of jurisdiction (R. 87). The court held that the 1959 amendment repealed the authority of the Commission to seek, and of the courts to grant, affirmance and enforcement of cease-and-desist orders entered by the Commission before its effective date (R. 81).

SUMMARY OF ARGUMENT

1. The court below held that by amending Clayton Act enforcement procedures in 1959, Congress withdrew from the Federal Trade Commission the authority to seek enforcement of orders entered prior to 1959 and abrogated the jurisdiction of the courts of appeal to affirm and enforce such orders at the Commission's request. That conclusion conflicts squarely with the plain intention of the Congress which enacted the statute, for it was Congress' purpose to strengthen enforcement of the Clayton Act and not to deprive any agency or court of the powers which it had previously possessed.

The authority given the Commission by the 1959 Act to issue orders which are enforceable under its streamlined procedures is not co-extensive with the power the Commission had before 1959 to obtain court enforcement of a Clayton Act order which had been violated. Congress could not, therefore, have believed that the abrogation of authority read into the statute by the court below would have achieved its purpose of strengthening Clayton Act enforcement. For the threat of an ultimate contempt sanction, which the pre-1959 procedure provided, effectively restrains respondents who might, absent such

a possibility, violate the terms of a Commission order. And since an order may permissibly restrain lawful conduct which is related to a violation of the Clayton Act, the Commission possesses authority under the pre-1959 procedures with respect to pre-1959 orders which it does not have if it must start afresh.

The court below relied heavily on the formalistic principle that a substitution of remedial provisions in a statute effectuates an immediate repeal of the earlier remedies. We submit that the amending language can be construed consistently with the overriding statutory purpose as prescribing new remedies for new orders and as leaving the pre-existing remedies in effect with respect to pre-1959 orders.

2. Even if the legislative purpose were not as clear as it is, the General Savings Statute, 1 U.S.C. 109, would bar the abrogation of the pre-1959 remedies absent an express provision to that effect in the Finality Act. The savings statute preserves any "liability incurred" under a repealed statute. Prior to 1959 respondent had incurred a "liability," and the proceeding brought in the court below to enforce the Commission's order was an "action or prosecution for the enforcement of such * * * liability".

ARGUMENT

INTRODUCTION

The court below held that a consequence of the enactment of the Finality Act of 1959 was to render unenforceable orders such as the one against respondent—issued before the effective date of the amendment and not pending in the courts on that date. Our conten-

tion that this conclusion was erroneous is based *first* on the plain intention of Congress in enacting the 1959 legislation, and *second* on the terms of the General Savings Statute, 1 U.S.C. 109, which preserves liabilities incurred before the statute was amended. Before discussing these contentions in detail, however, we review briefly the background and history of the Finality Act of 1959 in order to place the amendment in proper perspective.

The Clayton Act of 1914, 38 Stat. 730, 734, vested jurisdiction to enforce various of its provisions in three administrative agencies: the Interstate Commerce Commission, the Federal Reserve Board and the Federal Trade Commission.[5] The agencies were empowered by Section 11 of the Act to issue complaints, to conduct hearings, and, upon making appropriate findings, to order respondents "to cease and desist from the violations."

The third paragraph of Section 11 authorized the agency, if a respondent "fails or neglects to obey such order of the Commission or Board while the same is in effect," to apply to a court of appeals "for the enforcement of its order." The court to which such application would be made was empowered "to make and enter a decree affirming, modifying, or setting aside" the agency order. See pp. 31–32, *infra*.

Section 11 was silent on the subject of the record which was required to support a finding that an agency order had been disobeyed. Although the statute did not spell out the sanction for violation of

[5] The Federal Communications Commission and the Civil Aeronautics Board were subsequently granted jurisdiction in their regulatory areas. 48 Stat. 1102; 52 Stat. 1025.

the reviewing court's enforcement decree, it was universally assumed that such violations were punishable as contempt.[4]

The fourth paragraph of Section 11 granted to respondents against whom orders had been entered the right to petition, at any time, to a court of appeals to have the order set aside. The court in which such a petition was filed was accorded the same jurisdiction to "affirm, set aside, or modify" the agency order as it had in agency enforcement proceedings.

Section 5 of the Federal Trade Commission Act of 1914, 38 Stat. 719, provided, in similar terms, for identical procedures to be followed in Commission cases involving unfair methods of competition.

Under these two statutes, the Federal Trade Commission and the courts of appeal developed various procedures for the enforcement of cease-and-desist orders. Some courts required the Commission to establish, before it could obtain enforcement, that its order had been violated.[5] Some of these courts granted the Commission's applications for "affirm-

[4] Cf. *Cheff* v. *Schnackenberg*, 384 U.S. 373; *Federal Trade Commission* v. *Pacific States Trade Association*, 88 F. 2d 1009 (C.A. 9); *Biddle Purchasing Co.* v. *Federal Trade Commission*, (C.A. 2), No. 15624, June 5, 1941; *Leavitt* v. *Federal Trade Commission*, (C.A. 2), No. 9037, February 4, 1929 and December 24, 1935. All these cases, other than *Biddle*, concerned Section 5 orders rather than Clayton Act orders, but the governing principle is the same in both situations.

[5] *E.g.*, *Federal Trade Commission* v. *Herzog*, 150 F. 2d 450 (C.A. 2) (Clayton Act); *Federal Trade Commission* v. *Baltimore Paint & Color Works*, 41 F. 2d 474 (C.A. 4); *Federal Trade Commission* v. *Standard Education Society*, 14 F. 2d 947 (C.A. 7) (F.T.C.A.); *Federal Trade Commission* v. *Whitney & Co.*, 192 F. 2d 746 (C.A. 9).

ance" but then referred the issue of disobedience to the Commission as a special master and entered their own enforcement orders only if disobedience was found.[6] One court of appeals required proof of disobedience before it would even consider the validity of the order.[7] Prior to this Court's decision in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, many courts did not require a preliminary showing of disobedience as a condition of enforcement when a respondent sought review. If, on the respondent's petition for review, the courts affirmed, they would also enforce the order whether or not the Commission had cross-petitioned for enforcement.[8]

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[6] *Federal Trade Commission* v. *Herzog*, *supra*; *Federal Trade Commission* v. *Standard Education Society*, 86 F. 2d 692 (C.A. 2), reversed, 302 U.S. 112; *Federal Trade Commission* v. *Balme*, 23 F. 2d 615 (C.A. 2), certiorari denied, 277 U.S. 598; *Federal Trade Commission* v. *Baltimore Paint & Color Works*, 41 F. 2d 474 (C.A. 4).

[7] *Federal Trade Commission* v. *Standard Education Society*, 14 F. 2d 947 (C.A. 7).

[8] Cross-petition filed: *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 730; *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 400 (C.A. 1); *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 380 (C.A. 2); *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 678 (C.A. 3); *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511, 520 (C.A. 6); *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 211, 221 (C.A. 7), affirmed, 324 U.S. 726; *Carter Carburetor Corporation* v. *Federal Trade Commission*, 112 F. 2d 722, 737 (C.A. 8). No cross-petition filed: *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 760; *Judson L. Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952 (C.A. 1); *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 135 (C.A. 2); *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607 (C.A. 4); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132

The confusion caused by the varied procedures and the general cumbersomeness of the remedy made it apparent, by 1938, that simpler and more efficient enforcement procedures would aid the Commission's task. The Wheeler-Lea Amendment to the Federal Trade Commission Act, 52 Stat. 111, clarified the jurisdiction of the Commission and streamlined the enforcement procedures under Section 5 of that Act. Orders issued under Section 5 were, by reason of the Wheeler-Lea Amendment, to become final sixty days after their issuance or upon affirmance by a court of appeals in which a petition for review had been filed by a respondent. The courts were expressly directed to decree enforcement whenever they affirmed an order of the Commission, and a violation of a final order was made punishable in a district court by a civil penalty of $5,000.

Section 5(a) of the Wheeler-Lea Act provided that outstanding orders of the Commission which were in effect on the date of the enactment would become final sixty days after that date or upon affirmance in review proceedings instituted during that 60-day period. In other words, respondents against whom orders were outstanding were subjected to the new procedures as of the date of the Wheeler-Lea Act.

These provisions applied, of course, only to pro-

F. 2d 48, 54 (C.A. 4); *Oliver Bros.* v. *Federal Trade Commission*, 102 F. 2d 763, 771 (C.A. 4); *Webb-Crawford Co.* v. *Federal Trade Commission*, 109 F. 2d 268 (C.A. 5), certiorari denied, 310 U.S. 638; *Modern Marketing Service* v. *Federal Trade Commission*, 149 F. 2d 970, 980 (C.A. 7); *Q.R.S. Music Company* v. *Federal Trade Commission*, 12 F. 2d 730, 733 (C.A. 7).

ceedings under Section 5. No similar proposals relating to Clayton Act orders were proposed or were before Congress when the Wheeler-Lea Act was passed.

The Commission was subsequently interested in having the same streamlined procedures made available for Clayton Act enforcement,[9] but the decisions which had permitted courts of appeal to grant enforcement in a respondent's review proceeding (note 8, *supra*) obviated some of the immediate need for amendatory legislation. In 1952, however, this Court held in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, that the Commission was not entitled to a decree of enforcement unless it established that a violation of its order had occurred or was imminent. It thereupon became clear that sanctions could be invoked against a Clayton Act violator only on his third violation: The Commission would have to establish that the respondent had violated the Act so as to issue an order. It would then have to prove a violation of the order to obtain a decree of enforcement from the court of appeals. And it would finally have to prove that the respondent committed a third violation to hold him in contempt of the enforcement decree. For the purpose of establishing that its order had been violated and that enforcement was appropriate, the Commission began to conduct post-order evi-

[9] Simon, *The Retroactivity of Amended Section II of the Clayton Act*, 1960 Antitrust Law Symposium, New York State Bar Association, CCH Trade Reg. Rep. No. 153, June 8, 1960, pp. 85-86.

dentiary proceedings on the question of disobedience before petitioning a court for enforcement.[10]

Several years before the *Ruberoid* decision, in 1946, the Commission first formally requested Congress to adapt the Wheeler-Lea procedures to Clayton Act cases.[11] The request was repeated in subsequent reports of the agency.[12] A bill to achieve this result was first introduced in the House in 1949.[13] It would have amended Section 11 to conform with the Wheeler-Lea procedures, and it would also have made the new procedure applicable to outstanding orders. No action was taken on the bill, however, and no further legislation was introduced for several years. In 1955, after the *Ruberoid* decision, various proposals to amend Section 11 were introduced. A House bill[14] followed the earlier proposed legislation and made the same provision for outstanding orders. Senator Sparkman introduced legislation in the Senate which did not, however, contain the Wheeler-Lea clause governing outstanding orders.[15] Instead, the Senate

[10] See *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 F. 2d 510 (C.A. 2); *Federal Trade Commission* v. *American Crayon Co.*, 223 F. 2d 264 (C.A. 6), reversed, 350 U.S. 907, 352 U.S. 806; *Federal Trade Commission* v. *Washington Fish & Oyster Co.*, 271 F. 2d 39 (C.A. 9), 282 F. 2d 595 (C.A. 9).

[11] 1946 Federal Trade Commission Annual Report 12.

[12] 1947 Federal Trade Commission Annual Report 13; 1948 Federal Trade Commission Annual Report 12; 1951 Federal Trade Commission Annual Report 7–8; 1952 Federal Trade Commission Annual Report 3; 1958 Federal Trade Commission Annual Report 7.

[13] H.R. 3402, 81st Cong., 1st Sess.

[14] H.R. 6745, 84th Cong., 1st Sess.

[15] S. 2205, 84th Cong., 1st Sess.

legislation made explicit provision only for orders which were being reviewed at the time of the legislation's effective date. Neither the House nor Senate bill was reported out of committee.

At the opening of the 85th Congress, Senator Sparkman again introduced his bill,[16] and Congressman Roosevelt presented the House version in that chamber.[17] After hearings,[18] the Sparkman bill was favorably reported by the Senate Judiciary Committee.[19] Congressman Roosevelt then introduced the Sparkman bill in the House.[20] In the meantime, the Senate passed the reported bill without debate. 104 Cong. Rec. 13789. The House, however, took no action on any of the proposals before it.

The President's economic messages to Congress for 1956, 1957, 1958 and 1959 also recommended amendatory legislation to expedite enforcement of Clayton Act orders (105 Cong. Rec. 12730, 12733), and the 86th Congress finally made the requested change in 1959. In that Congress Senator Sparkman introduced S. 726, a copy of the bill previously passed by the Senate. Four other similar bills were also introduced.[21] Without dissent, and with only brief discus-

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[16] S. 721, 85th Cong., 2d Sess.

[17] H.R. 8682, 85th Cong., 2d Sess., see also H.R. 10199, 85th Cong., 2d Sess.

[18] *Legislation affecting Sections 7, 11 and 15 of the Clayton Act*, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 85th Cong., 2d Sess.

[19] S. Rep. No. 1808, 85th Cong., 2d Sess.

[20] H.R. 13530, 85th Cong., 2d Sess.

[21] S. 714, H.R. 432, H.R. 2977, and H.R. 6049, 86th Cong., 1st Sess.

sion, Senator Sparkman's bill passed both chambers."[22] 105 Cong. Rec. 12729–12735; 12810–12811; 12974, 13221.

The effect of the amendment on outstanding Clayton Act orders was not discussed and no explanation was offered for the differences between the versions introduced in the House and Senate during the 84th and 85th Congresses. The enacted legislation, which became effective on July 23, 1959, made no express provision for outstanding orders other than those pending in the courts or previously reviewed. Section 2 of the Finality Act provided (p. 39, *infra*):

> The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the [Clayton Act] * * *. Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

Of the 440 outstanding enforceable Clayton Act orders in effect on July 23, 1959, 50 had been affirmed or enforced by appellate courts and 11 were pending in judicial review proceedings. (See Appendix D, pp. 41–49, *infra*). Consequently, 379 such orders were not explicitly covered in the amendment. The Commission initially took the position that, notwithstanding the Congress' failure to include the Wheeler-Lea

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[22] The Senate held no additional hearings. Its Judiciary Committee simply submitted a brief report endorsing the legislation. S. Rept. No. 83, 86th Cong., 1st Sess., pp. 50–55, *infra*. The House conducted brief hearings (*Finality of Clayton Act Orders*, Hearings before the Anti-trust Subcommittee of the House Judiciary Committee, 86th Cong., 1st Sess.) then reported the bill favorably. H. Rep. No. 580, 86th Cong., 1st Sess.

clause in the statute, the new procedure would apply to outstanding orders in the same manner as under the 1938 amendment to Section 5 of the Federal Trade Commission Act—*i.e.*, that such orders would become final 60 days after the effective date of the 1959 statute unless petitions to review were filed within that period. See *supra*, p. 9.

The Court of Appeals for the District of Columbia Circuit held in 1961, however, that the amended procedure did not apply to unreviewed pre-Finality Act orders. *Sperry Rand Corp.* v. *Federal Trade Commission*, 288 F. 2d 403; *Schick* v. *Federal Trade Commission*, 288 F. 2d 407; *Federal Trade Commission* v. *Nash-Finch Co.*, 288 F. 2d 407. Since these decisions the Commission has successfully invoked the pre-1959 procedure when it has found that a pre-Finality Act order has been violated.[22] This is the first case in which a respondent has contended that the effect of the 1959 Act was to abrogate the pre-existing enforcement procedures applicable to pre-1959 orders.

I

CONSTRUED IN LIGHT OF THE OBVIOUS CONGRESSIONAL INTENT, THE FINALITY ACT CANNOT BE READ AS HAVING ABROGATED ANY OF THE COMMISSION'S ENFORCEMENT POWERS

A. THE CONSTRUCTION GIVEN TO THE FINALITY ACT BY THE COURT OF APPEALS IS INCONSISTENT WITH CONGRESS' INTENTION TO STRENGTHEN ENFORCEMENT OF THE CLAYTON ACT.

[22] *Federal Trade Commission* v. *Pacific-Gamble-Robinson Co.*, No. 18260 (C.A. 9, 1962); *Federal Trade Commission* v. *Ben-*

1. The Finality Act of 1959 was enacted, according to the Senate Committee Report which accompanied the bill to the floor of that chamber, to "put teeth into Clayton Act orders and * * * [to] fill the enforcement void which has existed for many years." S. Rep. No. 83, 86th Cong., 1st Sess. (1959), p. 2; Appendix E, p. 53, *infra*.

The legislation's sponsors contemplated that the Act would "strengthen the enforcement provisions of section 11 of the Clayton Act" (*id.* at 3; p. 55, *infra*), by substituting new remedies for the then-existing procedures which were characterized as "laborious, time consuming, and very expensive" (*id.* at 2; p. 52, *infra*). The sponsors made it entirely clear, however, that the new legislation was not intended to cut back on the powers of the Commission to enforce the Clayton Act. Senator Sparkman, the bill's principal supporter, stated that "the bill in nowise proposes any deviation from the original intent of Congress when it enacted the Clayton Act and the Federal Trade Commission Act. * * * The bill * * * is in effect a perfecting amendment to the Clayton Act. It has no other purpose than to effect the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement in the same manner and to the same degree that the will of Congress was effectuated by the Wheeler-Lea amendments to the Federal Trade Commission Act." 105 Cong.

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rue Watch Co., No. 27752 (C.A. 2, 1962). See also *Wanderer* v. *Kaplan*, 1962 Trade Cases, § 70,535; *Nash-Finch Co.* v. *Federal Trade Commission*, 233 F. Supp. 910 (D. Minn.).

Rec. 12732–12733. The remarks of Congressman Celler, Chairman of the House Judiciary Committee, of Congressman Roosevelt, and of other supporters of the bill, were to the same effect. 105 Cong. Rec. 12730–12733. No contrary views were expressed in either house.

The Finality Act's caption in the Statutes at Large makes this overriding purpose entirely clear. It is there described as an act "[t]o amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder * * *." 73 Stat. 243. And the background of the legislation, which we have summarized at pp. 6–13, *supra*, demonstrates convincingly that it was designed to assist the Federal Trade Commission and not to deprive it of any enforcement powers it possessed.

The Act did not, of course, provide explicitly for the 379 then-outstanding orders which had never been reviewed in courts of appeals and which, because of the absence of any limitations provision in Section 11 of the 1914 Act, were still subject to judicial review. But Congress was plainly aware that such orders existed; the Senate report referred expressly to the "more than 80 outstanding Clayton Act cease-and-desist orders" which were then "under active study at the Commission to determine whether or not respondents are in compliance." S. Rep. No. 83, 86th Cong., 1st Sess. (1959), p. 2, p. 53, *infra*. We submit that by remaining silent with regard to these orders Congress did not intend to deprive them of any mean-

ingful effect. It intended, rather, to retain the pre-existing procedures for their enforcement."

2. The court of appeals in this case held that by amending Section 11 Congress had withdrawn from the Commission the power to obtain judicial enforcement of a pre-1959 order. While finding no indication in the legislative history of any intention to accomplish this result, the court below speculated that Congress may have believed that it was preferable to make the pre-1959 orders judicially unenforceable "than to perpetuate the old system as to old orders" (R. 86). We submit that such a belief would, on its face, have been so plainly inconsistent with the "strengthening" purpose of the Act that, if it had existed, it would have been expressed in the committee reports or on the floor of Congress.

To be sure, the old procedure was unwieldy. The Commission was eager to replace it with a more workable scheme, and Congress apparently was willing to accede to the Commission's request. But the result reached by the court below would not provide a sub-

[24] The fact that Congress enacted the Senate version of the proposed version of the Finality Act rather than the House version (which would have included a provision regarding existing orders similar to the one in the 1938 Wheeler-Lea Act, see pp. 11–12, *supra*) is not evidence of an intent to discard the pre-1959 orders. The only choice Congress was given was whether to establish a 60-day period, as the 1938 amendment did, in which outstanding orders could either be reviewed or would become final or to remain silent as to these orders. No proposed bill explicitly "saved" the pre-1959 remedy for pre-1959 orders. Hence, to the extent Congress rejected anything, it rejected only the kind of provision included in the Wheeler-Lea Act.

stitute for the old procedure; it would simply eliminate it altogether.

3. Nor is the pre-1959 procedure so totally useless that nothing is lost if all enforcement of pre-1959 orders is totally discarded. In having the power to obtain enforcement in the court of appeals, the Commission could wield the threat of contempt. Direct judicial enforcement is a meaningful remedy because a contempt sanction may fall heavily upon a corporation and its officers. See, *e.g.*, *In re Holland Furnace Co.*, 341 F. 2d 548 (C.A. 7), certiorari denied, 381 U.S. 924; *In re Cheff*, 341 F. 2d 548 (C.A. 7), affirmed *sub nom. Cheff* v. *Schnackenberg*, 384 U.S. 373.

Even though the contempt sanction is no more than a future possibility which applies, under the pre-1959 procedure, only to a third violation of the Act, it is an effective psychological deterrent. Commentators have observed that Clayton Act orders enforceable under the pre-1959 procedures did have a restraining effect upon businesses subject to such orders.[25] Indeed, the mere fact that petitions for review of 82 such orders were filed between 1914 and 1959 is proof enough that

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[25] See, *e.g.*, Schniderman, *Federal Trade Commission Orders under the Robinson-Patman Act*, 65 Harv. L. Rev. 750, 772 (1952): "Actual observation of companies operating under such orders * * * discloses that the fear of incurring enforcement proceedings or a contempt citation works a substantial reorientation in the pricing habits of a respondent. Since F.T.C. orders are not automatically final, it has been argued that there may be some difference between the degree of care exercised by a company which had not been placed under a court enforcement order and one which has, but cautious pricing policies are characteristic of both."

respondents did not consider the orders to be mere nullities.[26]

4. The court below apparently believed that the Commission could achieve the same result as it is seeking here by treating violations of pre-1959 orders as new violations of the Act and issuing cease-and-desist orders which would be enforceable in accordance with the Finality Act (R. 86). This overlooks the fact that there is a critical difference between the proof needed to establish an initial violation of the *statute* and what must be shown to prove that an *order* has been violated.

The statute declares a generalized liability which the Commission applies in full-scale administrative proceedings (16 C.F.R. 3.1 *et seq.*) to the facts of a particular case. Orders resulting from such proceedings define a particularized liability tailored by the Commission to remedy a particular respondent's misconduct. They are not simply prohibitions of the acts which led to the original offense; they may also condemn otherwise lawful practices by which the prohibited goal might be attained. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Fed-*

[26] The contempt sanction has been retained for certain cases under the Finality Act. If a respondent petitions for review and the court of appeals affirms the Commission's orders, the court "shall issue its own order commanding obedience" to the agency order (p. 36, *infra*). If the order has not been previously affirmed and it is violated, the government may, in addition to seeking civil penalties in the district court, obtain an injunction against further violations. See *United States* v. *Hindman* 179 F. Supp. 926 (D.N.J.), and ten other unreported cases—all involving orders under the Federal Trade Commission Act—listed at 3 CCH Trade Reg. Rep. ¶ 9711.40 (1965).

eral Trade Commission v. *National Lead Co.*, 352 U.S. 419, 430–431; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 51–53; cf. *Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, 366. Consequently, when the Commission seeks to prove that an order was violated, its proof need not establish a violation of the statute.

For example, orders remedying price discrimination under Section 2 of the Clayton Act are construed to encompass the statutory-cost justification and meeting-competition defenses.[27] But the Commission need not always overcome these defenses a second time in its enforcement proceeding, because the record concerning them in the original proceeding may be adequate. See *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. at 476–477. Moreover, the Commission may not have to prove—as it would in an original proceeding—that the respondent's conduct injured competition. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54. Typical orders under Section 2(a) entered since 1948 have flatly prohibited further price discriminations, without requiring additional proof of injury to competition.[28] Orders under Section 3, which prohibits ex-

[27] *Federal Trade Commission* v. *Broch & Co.*, *supra* at p. 367; *Federal Trade Commission* v. *National Lead Co.*, *supra* at p. 426; *Federal Trade Commission* v. *Ruberoid Co.*, *supra* at p. 475–476.

[28] See, e.g., *Moog Industries*, 51 FTC 931 (1955), affirmed, 238 F. 2d 43 (C.A. 8), 355 U.S. 411; *E. Edelmann & Co.*, 51 FTC 978 (1955), affirmed, 239 F. 2d 152 (C.A. 7), certiorari denied, 355 U.S. 941; *B. F. Goodrich Co.*, 50 FTC 138 (1953); *Sunshine Biscuits, Inc.*, 52 FTC 10 (1955); *Sperry Rand Corp.*, 55 FTC 655 (1958).

clusive dealing arrangements, typically prohibit any arrangement barring customers from dealing in competitors' products.[29] And orders in merger cases (Section 7) may bar specific types of acquisitions for a specified period.[30]

We emphasize that the question on which the issue presented here turns is not how substantially the Commission's enforcement power is affected by depriving it of pre-1959 remedies for pre-1959 orders; the question is rather whether there is enough of a difference to render it improbable that Congress would have wished this result. We submit that Congress would not have voluntarily chosen to deprive the Commission of either the psychological force which an enforceable pre-1959 order had or the reduced burden which rested on the Commission in enforcing orders rather than statutes. And it is surely fair to infer that if Congress had so intended, the legislative history of the Finality Act would contain some explicit reference to that purpose.

B. NO PRINCIPLE OF STATUTORY CONSTRUCTION BARS AN INTERPRETATION OF THE FINALITY ACT WHICH WOULD ACCORD WITH THE PLAIN LEGISLATIVE INTENT.

The court of appeals also erred in relying on the

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[29] *Dictograph Products, Inc.*, 50 FTC 281 (1953), affirmed, 217 F. 2d 821 (C.A. 2); certiorari denied, 349 U.S. 940; *Anchor Serum Co.*, 50 FTC 681 (1954), affirmed, 217 F. 2d 867 (C.A. 7); *Beltone Hearing Aid Co.*, 52 FTC 830 (1956); *Callaway Mills Co.*, 52 FTC 564 (1955); *Harley-Davidson Motor Co.*, 50 FTC 1047 (1954); *Champion Spark Plug Co.*, 50 FTC 30 (1953).

[30] *International Paper Company*, 53 FTC 1192 (1957); *Vendo Co.*, 54 FTC 253 (1957); *Automatic Canteen Co.*, 43 FTC 1831 (1958).

proposition that the "normal rule" of statutory construction is to read a substituting amendment as an immediate repeal of that part of the prior statute for which it is substituted (R. 78–79). While it is true that the Finality Act substituted new procedures for those governing judicial review under the former Section 11 of the Clayton Act, it did not explicitly deny the Commission the power to proceed with respect to existing orders in accordance with authority previously conferred. The language which accomplished the substitution of procedures is "[t]he third, fourth, fifth, sixth, and seventh paragraphs of [section 11 of the Clayton Act] are amended to read as follows: * * *" (p. 35, *infra*). The critical words here—"are amended to read as follows"—must themselves be construed, like the remaining terms of the statute, in light of "common sense, precedent, and legislative history." *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225. These standards all support a reading of the amendment which would give its substitution of remedies prospective effect only and would preserve the pre-existing procedures for enforcement of pre-1959 orders.

The highly formalistic approach taken by the court below is inconsistent with established modern principles of statutory construction. More than half a century ago, Mr. Justice Holmes, sitting on circuit, said in *Johnson* v. *United States*, 163 Fed. 30, 32 (C.A. 1):

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will

> should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

And in *Cabell* v. *Markham*, 148 F. 2d 737, 739, (C.A. 2), affirmed, 326 U.S. 494, the late Judge Learned Hand observed:

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

The interpretation which the court of appeals placed on the amending terms of the Finality Act of 1959 is "plainly at variance with the policy of the legislation as a whole" (*Ozawa* v. *United States*, 260 U.S. 178, 194) for it weakens, rather than strengthens, enforcement of the Clayton Act.

The Finality Act does not, on its face, lend any support to the court of appeals' doctrinaire reading. That much appears from decisions of this Court and the Court of Appeals for the District of Columbia Circuit, both of which assumed, on having occasion incidentally to consider the precise question in the course of resolving related issues, that the pre-1959 procedure would apply to pre-1959 orders. In *Sperry Rand Corp.* v. *Federal Trade Commission*, 288 F. 2d

403, the District of Columbia Circuit held that the new finality provisions did not apply to pre-amendment orders, noting that "[e]nforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered." 288 F. 2d at 406. And in *Federal Trade Commission* v. *Brock & Co.*, 368 U.S. 360, this Court observed, with respect to a pre-1959 order, that the only sanction available was that flowing from "violation of an enforcement order yet to be entered by an appropriate Court of Appeals * * *." 368 U.S. at 365.[21]

Moreover, a sensible construction of the statute, which would give due recognition to the principle that it ought not to be construed so as to ascribe arbitrary motives to the legislators, would compel the opposite result from that reached by the court below. For under Section 2 of the Finality Act, orders as to which review proceedings have been initiated prior to the date of enactment apparently may still be enforced by the pre-1959 procedures, whereas, in the court of appeals' view, orders which had never been appealed may not be so enforced. The firm which in good faith sought review of an order prior to July 23, 1959, would be subject to sanctions for violating that order; but other firms which had not sought

[21] This Court did not advert to the circumstance, on which the court below relied (R. 84), that "the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act" so as to fall within the exception provided by Section 2 of the Finality Act. That was not, we submit, the basis of this Court's observation in *Broch*.

review would be free to violate the orders against them with impunity. "There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 479. It would be unreasonable to ascribe to Congress a wish to make this arbitrary distinction.

II

THE GENERAL SAVINGS STATUTE PRESERVES THE REMEDIES BY WHICH THE PRE-1959 ORDER AGAINST RESPONDENT MAY BE ENFORCED

Even if the amending language of the Finality Act retroactively repealed the pre-existing jurisdictional provision, the General Savings Statute (Rev. Stat. 13, 1 U.S.C. 109) would preserve the authority of the courts to enforce pre-Finality Act orders on the petition of the Commission. The savings statute—enacted in 1871 (16 Stat. 432)—provides (p. 40, *infra*) that "[t]he repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such liability". Its obvious purpose was to safeguard against the inadvertent extinction of liabilities incurred under statutes which Congress found it necessary to amend. It is "a conserver; its office is to make the transi-

tion from one set of laws to another less painful and disrupting." Ruud, *The Savings Clause—Some Problems in Constructing and Drafting*, 33 Tex. L. Rev. 285, 286 (1955).

The construction of the Finality Act which the court of appeals adopted would violate the General Savings Statute by extinguishing either or both of two liabilities:

First, a liability was "incurred" by respondent, within the meaning of the savings statute, in 1958, when it engaged in the conduct which gave rise to the Commission's complaint against it. Under the then applicable law, respondent thereupon became liable to the entry of a cease-and-desist order which, if violated, would justify the entry of a judicial enforcement decree. The actual entry of the consent order in 1959 was part of the remedy prescribed by law for the enforcement of that liability. A second stage of that remedy—albeit a contingent one—was the issuance of an enforcement order by a court of appeals if respondent engaged in conduct violative of the agency's order. The savings statute, we submit, preserved both halves of this remedy; by seeking enforcement in 1965 the Commission was pursuing a "proper action or prosecution for the enforcement" of the initial "liability." If, on the other hand, the 1959 order were held unenforceable, that liability would effectively have been "release[d] or extinguish[ed]" within the meaning of the savings statute.

Second, the 1959 consent order itself constituted a "liability" incurred before the Finality Act was passed. Courts have held in several Labor Board

cases that an administrative cease-and-desist order is a "liability" within the meaning of the statute even though there is no sanction for violation of the order until it has been judicially enforced.[22] The "liability" incurred in this manner was also contingent—its further enforcement depended upon respondent's conduct. When, in 1965, the Commission sought enforcement of that order it was bringing an action for the enforcement of the liability arising out of the 1959 order, even though a condition of that enforcement was conduct in which respondent had engaged after 1959.

The court below erred in deeming the General Savings Statute inapplicable on the ground that the violation which was a necessary condition of the enforcement proceedings occurred after the passage of the Finality Act (R. 86). The fact that the conduct may have occurred at that time did not mean that the "liability [was] incurred" after 1959 within the meaning of the savings statute. As we have shown, the liability which was preserved when the Commission brought its enforcement proceeding was the pre-1959 liability incurred as a result of respondent's conduct or as a result of the entry of the cease-and-desist order against it. That liability, although conditional, was meaningful and legally cognizable, and the in-

[22] *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233 (C.A. 8), certiorari denied, 334 U.S. 845; *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131 (C.A. 4); *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908; *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485 (C.A. 6).

terpretation of the court of appeals would have the effect of extinguishing it.

Moreover, the liability created by the order and the procedure for enforcing it are not separable, as the court of appeals assumed. In *De La Rama S.S. Co. v. United States*, 344 U.S. 386, this Court held under the General Savings Statute that outright repeal of the War Risk Insurance Act did not extinguish the government's pre-existing liability or deprive the district courts of jurisdiction to enforce that liability. "[T]o strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and tends to defeat rather than further the legislative purpose." 344 U.S. at 390. The decision below has done precisely that.

Finally, application of the General Savings Statute is not barred by Section 2 of the Finality Act, which provides that the old procedures are to apply in cases where judicial review proceedings have been initiated prior to the time of the enactment (p. 39, *infra*). Liabilities are not extinguished under the General Savings Statute "unless the repealing Act shall so expressly provide * * *" (p. 40, *infra*). No express provision withdrawing the remedy appears in Section 2 or anywhere else in the Finality Act. Since the purpose of Section 2 was simply to indicate Congress' intent that the new procedures were to be prospective only (just as Section 5(a) of the Wheeler-Lea Act indicated that its procedures were to apply retrospectively), it would be unsound to read it as permitting the negative inference that pre-1959 procedures are unavailable in all

instances other than the narrow class which is specifically defined.

CONCLUSION

For the reasons stated the judgment of the court of appeals should be reversed and the case remanded to it for further proceedings on the Commission's petition for enforcement.

Respectfully submitted.

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NOVEMBER 1966.

APPENDIX A

Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (1958 ed.) 21 provided prior to July 23, 1959, as follows:

> Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such per-

son to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall file the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the application the court shall cause notice thereof to be served upon such person, and thereupon shall

have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission or Board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission or Board and thereupon the Commission or Board shall file in the court the record in the proceeding, as provided in section

2112 of Title 28. Upon the filing of such petition the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, determined as provided in section 1009(e) of Title 5, shall in like manner be conclusive.

Upon the filing of the record with it the jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise, relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

APPENDIX B

The Finality Act of 1959, Public Law 86–107, 73 Stat. 243 [15 U.S.C. 21], provides:

AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the first and second paragraphs of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21), are hereby redesignated as subsections (a) and (b) of such section, respectively.

(b) The last sentence of the second paragraph of such section which has been hereby redesignated as subsection (b) is amended to read as follows: "Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may

at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:

"(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancil-

lary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

"(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission

or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

"(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

"(g) Any order issued under subsection (b) shall become final—

"(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

"(3) upon the denial of a petition for certiorari, if the order of the commission or board

has been affirmed or the petition for review has been dismissed by the court of appeals; or

"(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

"(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3)

the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

"(k) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

Sec. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

APPENDIX C

The General Savings Statute, R.S. 13, as amended, 1 U.S.C. 109, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

APPENDIX D

EXISTING CORPORATIONS AGAINST WHICH THERE ARE OUTSTANDING PRE-1959 CLAYTON ACT ORDERS

The following table lists the existing corporations which are named as respondents in outstanding pre-1959 Clayton Act orders. Not included in the list are corporations whose present existence could not be verified from standard reference works or those who were named in cases which were subsequently dismissed or in orders whose validity is dubious under current Clayton Act principles. Nor are corporations subject to Section 7 orders listed if divestiture was the only relief required in the order and such divestiture has already occurred.

Corporations marked "*" have merged subsequent to the entry of the order.

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
4	A. B. Dick Co.		§ 3	5/25/17	1 FTC 20		
6	*Fleischmann Co.	X	§ 2, 3	4/18/18	1 FTC 119		
20	Cudahy Packing Co.		§ 2	7/31/18	1 FTC 199		
129	*Wayne Oil Tank & Pump Co.	X	§ 2	10/18/18	1 FTC 289		
504	Butterick Co., Inc.		§ 3	8/14/23	8 FTC 310	X	X
760	United States Steel Corp.	X	§ 2	7/21/24	8 FTC 1	X	X
781	*International Salt Co. of N.Y.	X	§ 2	6/28/22	5 FTC 67		
781	Morton Salt Co.	X	§ 2	6/28/22	5 FTC 67		
781	Diamond Crystal Salt Co.	X	§ 2	6/28/22	5 FTC 67		
781	Cutler Magnet Co.	X	§ 2	6/28/22	5 FTC 67		
781	Carey Salt Co.	X	§ 2	6/28/22	5 FTC 67		
781	Barton Salt Co.	X	§ 2	6/28/22	5 FTC 67		
1010	C. Reiss Coal Co.		§ 2	3/19/26	8 FTC 480		
1010	Berwind Fuel Co.		§ 2	3/19/26	8 FTC 480		
1580	Penick & Ford, Ltd.	X	§ 3	11/17/30	14 FTC 261		
2066	Standard Brands, Inc.		§ 2	6/15/39	29 FTC 121; 30 FTC 1117; 46 FTC 1485.	X	
2987	Anheuser-Busch, Inc.	X	§ 2	5/11/40	30 FTC 1209		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
3031	Great Atlantic & Pacific Tea Co.	.....	§ 2.....	1/25/38	26 FTC 496.....	X	X
3032	Biddle Purchasing Co.....	.....	§ 2.....	7/17/37	25 FTC 564.....	X	X
3032	General Grocer Co.....	.....	§ 2.....	7/17/37	25 FTC 564.....	X	X
3068	W.D. Allen Mfg. Co.....	.....	§ 2.....	12/31/37	26 FTC 200.....	X	X
3068	Virginia-Carolina Hardware Co.	.....	§ 2.....	12/31/37	26 FTC 200.....	X	X
3128	Elizabeth Arden Sales Corp.	.....	§ 2.....	10/ 3/44	39 FTC 288.....	X	X
3152	General Motors Corp.....	.....	§ 3.....	11/12/41	34 FTC 58.....	.....	
3154	Pittsburgh Plate Glass Co.	X	§ 2.....	10/30/37	25 FTC 1226.....	.....	
3154	Libbey-Owens-Ford Glass Co.	X	§ 2.....	10/30/37	25 FTC 1226.....	.....	
3154	Rolland Glass Co.....	X	§ 2.....	10/30/37	25 FTC 1226.....	.....	
3154	Blackford Window Glass Co.	X	§ 2.....	10/30/37	25 FTC 1226.....	.....	
3167	Alpha Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Arkansas Cement Corp.....	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Ash Grove Lime & Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	California Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Coplay Cement Mfg. Co..	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Giant Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Idaho Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Lone Star Cement Corp..	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Keystone Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Kosmos Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Lehigh Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Marquette Cement Mfg. Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Medusa Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Missouri Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Monarch Cement Co.....	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Monolith Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Monolith Portland Midwest Co.	.....	§ 2.....	7/17/43	37 TFC 87.....	X	X
3167	Nazareth Cement Co.....	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Northwestern States Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Oklahoma Cement Co.....	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Oregon Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Pittsburgh Plate Glass Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Southwestern Portland Cement Co.	.....	§ 2.....	7/17/43	37 FTC 87.....	X	X
3167	Whitehall Cement Mfg. Co.	.....	§ 2.....	7/17/43	37 TFC 87.....	X	X

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
3214	J. Aron & Co., Inc.		§ 2	10/20/38	27 FTC 1039	X	X
3214	Morton Salt Co.		§ 2	10/20/38	27 FTC 1039	X	X
3218	Quality Bakers of America Cooperative, Inc.		§ 2	4/27/39	28 FTC 1507; 29 FTC 1328.	X	X
3218	Firch Baking Co.		§ 2	4/27/39	28 FTC 1507; 29 FTC 1328.	X	X
3218	Stroehmann Bros. Co.		§ 2	4/27/39	28 FTC 1507; 29 FTC 1328.	X	X
3221	Bords Products Co.		§ 2	11/13/41	34 FTC 87; 43 FTC 619.		
3221	Dean Foods Co.		§ 2	11/13/41	34 FTC 87; 43 FTC 619.		
3232	American Optical Co.	X	§ 2	1/21/39	28 FTC 169		
3233	Bausch & Lomb, Inc.	X	§ 2	1/21/39	28 FTC 186		
3233	White Haines Optical Co.	X	§ 2	1/21/39	28 FTC 186		
3279	*Carter Carburetor Corp.		§ 3	1/18/39	28 FTC 116	X	X
3305	Nebraska Bridge Supply & Lumber Co.	X	§ 2	7/13/38	27 FTC 377		
3305	Rowe Mfg. Co.	X	§ 2	7/13/38	27 FTC 377		
3386	Master Lock Co.	X	§ 2	9/14/38	27 FTC 982		
3391	American Flange & Mfg. Co.	X	§ 3	12/12/38	27 FTC 1286		
3604	Brunswick Corp.		§ 3	12/ 7/42	35 FTC 736		
3607	National Biscuit Co.		§ 3	1/17/39	28 FTC 99		
3633	Corn Products Co.		§ 2, 3	3/16/42	34 FTC 850	X	X
3633	Corn Products Sales Co.		§ 2, 3	3/16/42	34 FTC 850	X	X
3646	C. F. Sauer Co.	X	§ 2	7/31/41	33 FTC 812		
3685	U.S. Rubber	X	§ 2	4/25/39	28 FTC 1489		
3688	Signode Corp.		§ 3	8/20/41	33 FTC 1049	X	X
3749	*Lambert Pharmacal Co.	X	§ 2	8/12/40	31 FTC 734		
3765	Chase & Co.		§ 2	12/22/39	30 FTC 224		
3798	Anheuser-Busch, Inc.		§ 2	9/25/40	31 FTC 986		
3801	Hubinger Co.		§ 2	4/ 3/41	32 FTC 1116		
3802	Penick & Ford, Ltd.	X	§ 2	11/29/40	31 FTC 1494		
3803	A. E. Staley Mfg. Co.		§ 2	6/14/42	34 FTC 1362	X	X
3804	Union Starch & Ref. Co.	X	§ 2	12/11/40	32 FTC 60		
3804	Union Sales Corp.	X	§ 2	12/11/40	32 FTC 60		
3805	American Maize-Products Co.	X	§ 2	3/15/41	32 FTC 901		
3818	*Acme Steel Co.		§ 3	8/20/41	33 FTC 1062		
3820	*A. S. Aloe Co.		§ 2	12/15/41	34 FTC 363		
3834	C. R. Anthony Co.	X	§ 2	9/12/39	29 FTC 922; 30 FTC 1103.		
3840	Simmons Co.	X	§ 2	8/25/39	29 FTC 727		
3843	American Oil Co.	X	§ 2	9/ 9/39	29 FTC 857		
3843	General Finance, Inc.	X	§ 2	9/ 9/39	29 FTC 857		
3844	Williams & Wilkins Co.	X	§ 2	8/23/39	29 FTC 678		
3929	Walter Kidde & Co.	X	§ 3	3/20/40	30 FTC 757		
3929	*American La France-Foamite Industries, Inc.	X	§ 3	3/20/40	30 FTC 757		
3965	Sherwin-Williams Co.	X	§ 2	1/ 8/43	36 FTC 25		
3965	*Lowe Brothers Co.	X	§ 2	1/ 8/43	36 FTC 25		
3965	*John Lucas & Co.	X	§ 2	1/ 8/43	36 FTC 25		
3977	Champion Spark Plug Co.		§ 2, 3	7/10/53	50 FTC 30		
4110	Milford Rivet & Machine Co.		§ 3	2/ 9/44	38 FTC 180		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
4111	Judson L. Thomson Mfg. Co.		§ 3	2/ 9/44	38 FTC 135	X	X
4143	Binney & Smith, Inc.		§ 2	12/31/40	32 FTC 315	X	X
4275	A. W. Sisk & Son	X	§ 2	11/30/40	31 FTC 1343		
4281	General Grocer Co.	X	§ 2	6/27/42	33 FTC 977		
4307	*International Salt Co.	X	§ 2	8/22/52	49 FTC 138		
4307	*Independent Salt Co.		§ 2	8/22/52	49 FTC 138		
4307	*Eastern Salt Co.		§ 2	8/22/52	49 FTC 138		
4319	Morton Salt Co.		§ 2	7/28/44	39 FTC 35; 40 FTC 388; 45 FTC 326.	X	X
4344	Vonnegut Hardware Co.	X	§ 2	1/23/41	32 FTC 512		
4356	Seaboard Packing Co.	X	§ 2	4/15/41	32 FTC 1192		
4486	Arkansas State Rice Milling Co.	X	§ 2	8/21/41	33 FTC 1114		
4548	E. J. Brach & Sons	X	§ 2	12/21/44	39 FTC 535		
4560-64	Edwin B. Simpson Co.		§ 3	2/ 9/44	38 FTC 162; 38 FTC 169; 38 FTC 171; 38 FTC 183; 38 FTC 198.		
4560-64	National Rivet & Mfg. Co.		§ 3	2/ 9/44	38 FTC 162; 38 FTC 169; 38 FTC 171; 38 FTC 183; 38 FTC 198.		
4560-64	Chicago Rivet & Machine Co.		§ 3	2/ 9/44	38 FTC 162; 38 FTC 169; 38 FTC 171; 38 FTC 183; 38 FTC 198.		
4571	*Life Savers Corp.	X	§ 2, 2(a), 2(d).	12/22/41	34 FTC 473		
4585	American Agricultural Chemical Co.	X	§ 2	3/25/46	42 FTC 114		
4590	Nash-Finch Co.		§ 2	1/ 6/47	43 FTC 297		
4678	Curtiss Candy Co.		§ 2	11/12/47	44 FTC 237; 48 FTC 161.		
4677	Walter H. Johnson Candy Co.	X	§ 2	6/11/48	44 FTC 1021		
4915	Dentists Supply Co. of New York.	X	§ 2	8/17/43	37 FTC 345		
4920	Honeywell, Inc.		§ 3	1/14/48	44 FTC 851	X	X
4933	Automatic Canteen Co. of America.		§ 3	6/ 6/50	46 FTC 861; 51 FTC 574.	X	X
4972	U.S. Rubber Co.	X	§ 2	6/30/50	46 FTC 998		
5013	National Biscuit Co.	X	§ 2	2/23/44	38 FTC 213; 50 FTC 982.		
5017	Ruberoid Co.		§ 2	1/20/50	46 FTC 879	X	
5027	Associated Merchandising Corp.	X	§ 2	5/ 8/45	40 FTC 578		
5027	L. S. Ayres & Co.	X	§ 2	5/ 8/45	40 FTC 578		
5027	Dayton Co.	X	§ 2	5/8/45	40 FTC 578		
5027	Emporium-Capwell Co.	X	§ 2	5/8/45	40 FTC 578		
5027	B. Forman Co.	X	§ 2	5/8/45	40 FTC 578		
5027	Joseph Horne Co.	X	§ 2	5/8/45	40 FTC 578		
5027	J. L. Hudson Co.	X	§ 2	5/8/45	40 FTC 578		
5027	Hutzler Bros. Co.	X	§ 2	5/8/45	40 FTC 578		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
5027	Strawbridge & Clothier	X	§ 2	5/8/45	40 FTC 578		
5027	Thalhimer Bros., Inc.	X	§ 2	5/8/45	40 FTC 578		
5049	American Art Clay Co.	X	§ 2	5/18/44	38 FTC 423		
5115	General Baking Co.	X	§ 2	4/26/44	38 FTC 307		
5172	John B. Stetson Co.	X	§ 2	10/6/45	41 FTC 244		
5253	National Lead Co.		§ 2	1/12/53	49 FTC 791	X	
5253	Sherwin-Williams Co.		§ 2	1/12/53	49 FTC 791	X	
5253	Glidden Co.		§ 2	1/12/53	49 FTC 791	X	
5253	Eagle-Picher Co.		§ 2	1/12/53	49 FTC 791	X	
5270	Whitney & Co.		§ 2	3/25/46	42 FTC 136	X	X
5284	Parrott & Co.	X	§ 2	3/26/46	42 FTC 155		
5326	Arnold Constable Corp.	X	§ 2	2/3/50	46 FTC 404		
5326	Auerbach Co.	X	§ 2	2/3/50	46 FTC 404		
5326	Fowler, Dick, and Walker	X	§ 2	2/3/50	46 FTC 404		
5326	Hecht Co.	X	§ 2	2/3/50	46 FTC 404		
5326	Popular Dry Goods Co.	X	§ 2	2/3/50	46 FTC 404		
5326	Ames & Brownley, Inc.	X	§ 2	2/3/50	46 FTC 404		
5326	King's, Inc.	X	§ 2	2/3/50	46 FTC 404		
5326	Ogus Rabinovich & Ogus, Inc.	X	§ 2	2/3/50	46 FTC 404		
5404	Wilbur-Ellis Co.	X	§ 2	9/23/46	43 FTC 164		
5423	Stokely-Van Camp, Inc.		§ 2	3/7/52	48 FTC 894		
5423	Dean Foods Co.		§ 2	3/7/52	48 FTC 894		
5423	Fleming Co.		§ 2	3/7/52	48 FTC 894		
5423	Haas Bros.		§ 2	3/7/52	48 FTC 894		
5423	Utah Wholesale Grocery Co.		§ 2	3/ 7/52	48 FTC 894		
5423	Roundup Grocery Co.		§ 2	3/ 7/52	48 FTC 894		
5423	Inter-State Grocer Co.		§ 2	3/ 7/52	48 FTC 894		
5423	Millliken Tomlinson Co.		§ 2	3/ 7/52	48 FTC 894		
5423	Holbrook Grocery Co.		§ 2	3/ 7/52	48 FTC 894		
5423	McLain Grocery Co.		§ 2	3/ 7/52	48 FTC 894		
5436	Draper Corp.	X	§ 2, 3	5/ 5/47	43 FTC 480		
5462	California Marine Curing & Packing Co.	X	§ 2	2/13/47	43 FTC 304		
5469	Hunt Foods & Industries, Inc.		§ 2	8/11/48	45 FTC 145		
5471	New England Fish Co.	X	§ 2	1/12/48	44 FTC 340		
5482	District Grocery Stores, Inc.		§ 2	12/13/51	48 FTC 581		
5502	Corn Products Co.		§ 2	11/20/50	47 FTC 587		
5502	Corn Products Sales Co.		§ 2	11/20/50	47 FTC 587		
5502	A. E. Staley Mfg. Co.		§ 2	11/20/50	47 FTC 587		
5502	Penick & Ford, Ltd.		§ 2	11/20/50	47 FTC 587		
5502	American Maize-Products Co.		§ 2	11/20/50	47 FTC 587		
5502	Anheuser-Busch, Inc.		§ 2	11/20/50	47 FTC 587		
5502	Hubinger Co.		§ 2	11/20/50	47 FTC 587		
5502	National Starch & Chemical Corp.		§ 2	11/20/50	47 FTC 587		
5502	Union Starch & Ref. Co.		§ 2	11/20/50	47 FTC 587		
5502	Union Sales Corp.		§ 2	11/20/50	47 FTC 587		
5534	Bonner Packing Co.	X	§ 2	11/9/50	47 FTC 557		
5576	J. Richard Phillips & Sons, Inc.		§ 2	2/8/50	46 FTC 467		
5576	H. P. Cannon & Son, Inc.		§ 2	2/8/50	46 FTC 467		
5620	General Motors Corp.		§ 2, 3	7/10/53	50 FTC 54		
5622	Larsen Co.		§ 2	2/6/50	46 FTC 437		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
5624	*Electric Auto-Lite Co.		§ 2	7/10/53	50 FTC 73		
5640	Florida Citrus Canners Cooperative.		§ 2	7/14/52	49 FTC 37		
5648	National Tea Co.		§ 2	5/15/50	46 FTC 829; 47 FTC 1314.		
5655	Dictograph Corp.		§ 3	9/24/53	50 FTC 281	X	
5670	Ideal Cement Co.	X	§ 2	9/28/50	47 FTC 221–1030.		
5671	Monolith Portland Cement Co.		§ 2	5/4/51	47 FTC 1292		
5671	Monolith Portland Midwest Co.		§ 2	5/4/51	47 FTC 1292		
5685	Revlon, Inc.		§ 3	9/23/54	51 FTC 260; 51 FTC 466.		
5696	Central Soya Co.		§ 2	1/11/51	47 FTC 839		
5698	Harley-Davidson Motor Co.		§ 3	6/29/54	50 FTC 1047		
5701	Horlicks Corp.		§ 3	9/19/50	47 FTC 169		
5721	Standard Motor Products, Inc.		§ 2	12/27/57	50 FTC 624; 54 FTC 814.	X	
5722	Whitaker Cable Corp.		§ 2	4/29/55	51 FTC 958	X	
5723	Moog Industries, Inc.		§ 2	4/29/55	51 FTC 931	X	
5766	Corpus Christi Hardware Co.		§ 2	1/24/59	50 FTC 952; 55 FTC 1279.	X	
5766	Keith-Simmons Co.		§ 2	1/24/59	50 FTC 952; 55 FTC 1279.	X	
5766	Mills-Morris Co.		§ 2	1/24/59	50 FTC 952; 55 FTC 1279.	X	
5766	Robinson Bros.		§ 2	1/24/59	50 FTC 952; 55 FTC 1279.	X	
5766	Williams Hardware Co.		§ 2	1/24/59	50 FTC 952; 55 FTC 1279.	X	
5768	C. E. Niehoff & Co.		§ 2	5/17/55	51 FTC 1114	X	
5769	Federal-Mogul-Bower Bearings, Inc.	X	§ 2	6/ 9/58	54 FTC 1628		
5770	E. Edelmann & Co.		§ 2	4/29/55	51 FTC 978; 53 FTC 1268.		
5771	Namsco, Inc.		§ 2	3/17/53	49 FTC 1161		
5773	*Appleton-Century-Crofts, Inc.		§ 2	6/13/51	47 FTC 1371		
5794	Standard Oil Co. (Ohio)	X	§ 2	7/19/51	48 FTC 53		
5794	Standard Oil Co. of Cal.	X	§ 2	7/19/51	48 FTC 53		
5794	Standard Oil Co. (Indiana).	X	§ 2	7/19/51	48 FTC 53		
5794	Standard Oil Co. (N.J.)	X	§ 2	7/19/51	48 FTC 53		
5797	*Underwood Corp.		§ 3	3/ 2/53	49 FTC 1123		
5819	Pacific Gamble Robinson Co.		§ 2	4/12/51	47 FTC 1202	X	X
5822	Maico Electronics, Inc.	X	§ 3	6/ 3/55	50 FTC 485		
5828	Holtite Mfg. Co.		§ 2	10/30/53	50 FTC 379		
5836	Gruen Industries, Inc.		§ 2	3/14/52	48 FTC 979		
5837	Elgin National Watch Co.		§ 2	3/14/52	48 FTC 990		
5865	Consolidated Cigar Corp.		§ 2	7/7/51	48 FTC 3		
5872	Thompson Products, Inc.		§ 2	2/19/59	55 FTC 1252		
5879	Consolidated Companies, Inc.		§ 2	3/31/51	48 FTC 254		
5882	Outboard Marine Corp.		§ 3, 11	6/27/56	52 FTC 1553		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
5897	Doubleday & Co.		§ 2	8/31/55	50 FTC 262; 52 FTC 169.		
5898	*Harper & Brothers	X	§ 2	3/23/56	52 FTC 1017		
5921	Hastings Potato Growers Ass'n.	X	§ 2	3/5/52	48 FTC 746		
5960	Houghton Mifflin Co.	X	§ 2	3/13/52	48 FTC 861		
5961	Little, Brown & Co.	X	§ 2	3/13/52	48 FTC 869		
5962	Random House, Inc.	X	§ 2	3/13/52	48 FTC 878		
5963	Simon & Schuster, Inc.	X	§ 2	3/13/52	48 FTC 886		
5965	Anchor-Serum Co.		§ 3	2/16/54	50 FTC 681	X	X
5969	Benrus Watch Co.	X	§ 2	11/ 6/52	49 FTC 476		
5971	Kentucky Chemical Industries, Inc.	X	§ 2	8/ 6/52	49 FTC 87		
5973	Early & Daniel Co.	X	§ 2	8/ 6/52	49 FTC 108		
5974	Page Dairy Co.		§ 2	10/30/53	50 FTC 395		
5982	American Greetings Corp.		§ 2	10/23/52	49 FTC 440	X	
5989	Fruitvale Canning Co.		§ 2	6/15/56	50 FTC 177; 52 FTC 1504.		
6018	General Foods Corp.		§ 2	2/15/56	52 FTC 798		
6039	Western Grain Co.	X	§ 2	1/27/53	49 FTC 963		
6042	American Biltrite Rubber Co.	X	§ 2	8/17/53	50 FTC 133		
6043	B.F. Goodrich Co.	X	§ 2	8/17/53	50 FTC 138		
6044	Goodyear Tire & Rubber Co.	X	§ 2	8/17/53	50 FTC 143		
6045	O'Sullivan Rubber Corp.	X	§ 2	8/17/53	50 FTC 149		
6051	Shell Oil Co.	X	§ 3	3/17/53	49 FTC 1182		
6061	Jacobs Mfg. Co.	X	§ 2	6/24/53	49 FTC 1463		
6160	Topco Associates, Inc.	X	§ 2	8/17/54	51 FTC 83		
6191	Sunshine Biscuits, Inc.	X	§ 2	7/20/54 7/29/55	51 FTC 25		
6198	Frank F. Taylor Co.		§ 2	6/20/54	51 FTC 51		
6215	Jonathan Logan, Inc.	X	§ 2	5/29/55	51 FTC 1229		
6221	Simplicity Pattern Co.		§ 2	3/13/57	53 FTC 771	X	
6255	Florida Citrus Exchange, Inc.		§ 2	11/26/56	53 FTC 493		
6334	Cross Baking Co., Inc.	X	§ 3	6/24/55	52 FTC 54		
6352	Callaway Mills Co.	X	§ 3	12/ 8/55	52 FTC 564		
6366	Union Malleable Mfg. Co.	X	§ 2	9/23/55	52 FTC 408		
6383	American Brake Shoe Co.	X	§ 2	11/15/55	52 FTC 484		
6391	Union Bag-Camp Paper Corp.	X	§ 7	5/10/56	52 FTC 1278		
6420	Brunswig Drug Co.	X	§ 2	1/17/56	52 FTC 699		
6420	Durr Drug Co.	X	§ 2	1/17/56	52 FTC 699		
6420	Gilman Bros., Inc.	X	§ 2	1/17/56	52 FTC 699		
6420	Kauffman-Lattimer Co.	X	§ 2	1/17/56	52 TFC 699		
6420	Kiefer Stewart Co.	X	§ 2	1/17/56	52 FTC 699		
6420	McPike, Inc.	X	§ 2	1/17/56	52 FTC 699		
6420	Owens, Minor & Bodeker, Inc.	X	§ 2	1/17/56	52 FTC 699		
6420	Scott Drug Co.	X	§ 2	1/17/56	52 FTC 699		
6420	Smith, Kline & French, Inc.	X	§ 2	1/17/56	52 FTC 699		
6420	Southwestern Drug Corp.	X	§ 2	1/17/56	52 FTC 699		
6440	*Hudnut Sales Co., Inc.	X	§ 2	4/ 4/56	52 FTC 1064		
6441	Helena Rubinstein, Inc.	X	§ 2	5/ 9/56	52 FTC 1267		
6442	Yardley of London, Inc.	X	§ 2	4/19/56	52 FTC 1086		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
6444	Fox Grocery Co.	X	§ 2	4/24/56	52 FTC 1140		
6444	Consolidated Foods Corp.	X	§ 2	4/24/56	52 FTC 1140		
6444	Standard Wholesale Co.	X	§ 2	4/24/56	52 FTC 1140		
6444	Waples-Platter Co.	X	§ 2	4/24/56	52 FTC 1140		
6461	Reed Candy Co.	X	§ 2	1/28/58	54 FTC 979	X	
6462	*Tetley Tea Co., Inc.	X	§ 2	4/26/56	52 FTC 1181		
6463	*Crosse & Blackwell Co.		§ 2	5/ 2/56	52 FTC 1014; 54 FTC 1569; 54 FTC 1574.		
6466	*Minute Maid Corp.	X	§ 2	7/27/56	53 FTC 84		
6467	J. H. Filbert, Inc.		§ 2	9/19/57	54 FTC 389		
6468	Pompeian Olive Oil Corp.	X	§ 2	9/20/57	52 FTC 1014; 54 FTC 874.	X	X
6470	McCormick & Co.	X	§ 2	9/20/57	54 FTC 895	X	X
6480	Thomas Y. Crowell Co.	X	§ 2	3/ 6/56	52 FTC 919		
6519	Revlon, Inc.	X	§ 2	8/17/56	53 FTC 127		
6523	Johnson & Johnson	X	§ 2	9/27/56	53 FTC 294		
6527	Scoville Mfg. Co.	X	§ 7	9/14/56	53 FTC 260		
6592	Groveton Papers Co.		§ 2	5/ 7/58	54 FTC 1490		
6595	Sunkist Growers, Inc.	X	§ 2	5/ 7/58	54 FTC 1574		
6596	General Foods Corp.		§ 2	5/ 7/58	54 FTC 1502	X	
6597	General Biscuits, Inc.		§ 2	5/ 7/58	54 FTC 1514; 55 FTC 2044.		
6598	Piel Bros., Inc.		§ 2	5/ 7/58	54 FTC 1526		
6599	Hudson Pulp & Paper Corp.		§ 2	5/ 7/58	54 FTC 1538		
6600	P. Lorillard Co.		§ 2	5/ 7/58	54 FTC 1550	X	
6624	Otarion, Inc.	X	§ 3	3/14/57	53 FTC 780		
6633	Wakefern Food Corp.	X	§ 2	3/22/57	53 FTC 783		
6633	Twin County Grocers, Inc.	X	§ 2	3/22/57	53 FTC 783		
6635	Bourjois, Inc.	X	§ 2	3/ 5/57	53 FTC 781		
6646	Vendo Co.		§ 7	9/ 6/57	53 FTC 1286; 54 FTC 253.		
6654	Sealed Power Corp.	X	§ 2	5/ 3/57	53 FTC 970		
6673	Culligan, Inc.	X	§ 3	5/23/57	53 FTC 1072		
6698	Shell Oil Co.	X	§ 2	4/ 2/58	54 FTC 1274		
6699	Pittsburgh Plate Glass Co.	X	§ 2	4/19/57	53 FTC 902		
6700	Libbey-Owens-Ford Glass Co.	X	§ 2	5/22/57	53 FTC 1088		
6701	Sperry Rand Corp.	X	§ 2	11/ 3/58	55 FTC 655; 56 FTC 1634.		
6737	Borden Co.	X	§ 2	11/13/57	54 FTC 563		
6747	Topps Chewing Gum, Inc.	X	§ 2	10/23/57	54 FTC 475		
6749	Leaf Brands, Inc.	X	§ 2	9/13/57	54 FTC 321		
6764	Eis Automotive Corp.		§ 2	3/20/59	55 FTC 1473		
6765	Auto Electric Service Corp.		§ 2	12/23/58	55 FTC 910		
6766	Amalgamated Sugar Co.	X	§ 2	1/21/58	54 FTC 943		
6816	*Airtex Products, Inc.	X	§ 2	5/12/59	55 FTC 1754		
6820	Automatic Canteen Co. of America.	X	§ 7	6/23/58	54 FTC 1831		
6833	Ward Foods Co.	X	§ 2	2/10/59	54 FTC 1919; 55 FTC 1142.		
6877	Allen V. Smith, Inc.	X	§ 2	1/22/58	54 FTC 967		
6900	Allbright's		§ 2	3/27/59	55 FTC 1556		

FTC docket No.	Name of respondent	Consent proceeding	Section of Clayton Act	Date of order	Citation	Affirmed	Enforced
6891	Neapco Products, Inc.	X	§ 2	11/24/58	55 FTC 708		
6892	Shick Electric, Inc.	X	§ 2	11/ 3/58	55 FTC 685		
6908	North American Philips Co.	X	§ 2	10/29/58	55 FTC 697; 56 FTC 1041,		
6910	Food Mart, Inc.	X	§ 2	8/ 6/58	54 FTC 1452		
6919	Dan Dee Pretzel & Potato Chip Co.	X	§ 2	6/27/58	54 FTC 1844		
6942	Deming & Gould Co.	X	§ 2	8/12/58	54 FTC 1804		
7021	Ward's Cove Packing Co.	X	§ 2	7/ 3/58	55 FTC 49		
7032	*Thermoid Co.	X	§ 2	10/ 3/58	55 FTC 518		
7066	Ronson Corp.	X	§ 2	1/ 8/59	55 FTC 1017		
7072	William Freihofer Baking Co.	X	§ 2	1/ 7/59	55 FTC 993		
7090	Maguire Industries, Inc.	X	§ 2	9/11/58	55 FTC 306		
7117	Longines-Wittnauer Watch Co.	X	§ 2	11/14/58	55 FTC 731		
7117	Associated Barr Stores, Inc.	X	§ 2	11/14/58	55 FTC 731		
7119	Trifari, Krussman & Fishel, Inc.	X	§ 2	9/23/58	55 FTC 397		
7119	Associated Barr Stores, Inc.	X	§ 2	9/23/58	55 FTC 397		
7141	Firestone Tire & Rubber Co.		§ 2	8/12/59	55 FTC 1739		
7142	Automotive Supply Co.	X	§ 2	8/29/59	56 FTC 192		
7142	Central Warehouse Co.	X	§ 2	8/29/59	56 FTC 192		
7210	*Point Adams Packing Co.	X	§ 2	12/ 5/58	55 FTC 852		
7215	Hudson House, Inc.	X	§ 2	2/12/59	55 FTC 1225		
7239	Frito-Lay, Inc.	X	§ 2	3/10/59	55 FTC 1416		
7239	International Basic Economy Corp.	X	§ 2	3/10/59	55 FTC 1416		
7243	Market Forge Co.	X	§ 2	3/27/59	55 FTC 1578		
7247	Jantzen, Inc.	X	§ 2	1/16/59	55 FTC 1065		
7265	Alton Canning Co.	X	§ 2	6/ 1/59	55 FTC 1991		
7317	Sav-A-Stop, Inc.	X	§ 2	5/19/59	55 FTC 1807		
7447	Pangburn Co.	X	§ 2	7/15/59	56 FTC 57		

APPENDIX E

The following is the full text of S. Rep. No. 83, 86th Cong., 1st Sess., exclusive of the text of the statute and communications to the Senate Committee from the various administrative agencies:

SENATE

86TH CONGRESS, 1ST SESSION

CALENDAR NO. 76

REPORT NO. 83

MAKING CLAYTON ACT ORDERS FINAL

MARCH 5, 1959.—Ordered to be printed

Mr. KEFAUVER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 726]

The Committee on the Judiciary, to which was referred the bill (S. 726) to amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

AMENDMENTS

1. On page 2, commencing with the letter "A" on line 8, strike all down to and including "script" on line 18 and insert in lieu thereof the following:

> A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record and shall have power to make and enter.

2. On page 3, line 22, following "(d)", strike the word "The" and insert in lieu thereof the following: "Upon the filing of the record with it the".

3. On page 4, line 3, after the word "of", insert the word "the".

PURPOSE OF AMENDMENTS

Amendments Nos. 1 and 2 are technical in nature, their purpose being to conform the language in this bill in the act of August 28, 1958, which authorized abbreviated records in reviewing administrative agency proceedings.

The purpose of amendment No. 3 is to correct a typographical error.

PURPOSE

The purpose of the proposed legislation, as amended, is to provide that orders issued by the

Federal Trade Commission and other agencies under section 11 of the Clayton Act shall become final in the same manner in which orders issued by the Federal Trade Commission under section 5 of the Federal Trade Commission Act become final.

STATEMENT

Public hearings were conducted by the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary on a similar proposal of the 85th Congress (S. 721) and other legislation on April 1, 2, 24, and 25, 1958, and during the course of these public hearings the Honorable John W. Gwynne, Chairman, Federal Trade Commission, as well as Robert A. Bicks, assistant to the Assistant Attorney General in charge of the Antitrust Division, testified in support of the proposed legislation. For this reason the subcommittee did not hold additional hearings during the 1st session of the 86th Congress.

The effectiveness of the Clayton Act, as amended by the Robinson-Patman Act, has long been handicapped by the absence of adequate enforcement provisions. Existing procedures are laborious, time consuming, and very expensive. The Federal Trade Commission must investigate and, after complaint, prove, on the record, violations of the act before a cease-and-desist order may be issued. After the order to cease and desist has been issued, the Commission must again investigate and again prove violations of the order and of the act before the Commission can obtain a court order commanding obedience to the Commission's

order to cease and desist. Upon such proof, the court enforces the Commission's order. Only then, if the respondent violates the act a third time, does he become subject to penalty. Thus, before a respondent can actually be punished for violation of the Clayton Act, as amended by the Robinson-Patman Act, the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations of the law. At the present time, more than 80 outstanding Clayton Act cease-and-desist orders are under active study at the Commission to determine whether or not respondents are in compliance. This figure includes 17 cases which have been assigned for field investigation, 12 where the results of field investigation are being reviewed, and 6 cases which have been assigned for investigational hearings.

S. 726 would put teeth into Clayton Act orders and would fill the enforcement void which has existed for many years. The Federal Trade Commission has sought this type of legislation for more than 20 years, but the need for the amendatory legislation became even more pressing in 1952 when the Supreme Court decided *Federal Trade Commission* v. *Ruberoid* (343 U.S. 470). Prior to that decision, the Commission had been able to proceed for enforcement of Clayton Act orders by cross-petition in cases where respondents had petitioned for review in the U.S. courts of appeals. In Ruberoid, the Supreme Court held that the courts are without authority to issue an order commanding obedience to an order of the Commission under the Clayton Act until the Com-

mission had established violations of its order. Commenting on this holding, Justice Jackson stated in dissent:

> I see no real sense, when the case is already before the court and is approved, in requiring one more violation before its obedience will be made mandatory on pain of contempt (343 U.S. 470, 494).

Judge Gwynne, in testifying in favor of this legislation on behalf of the Federal Trade Commission, stated that it is clear that the Clayton Act, as amended by the Robinson-Patman Act, would be more effectively administered and would be of much greater value as a deterrent if amended as proposed by S. 726.

The Board of Governors of the Federal Reserve System has advised the committee that it favors the general objective embodied in S. 726, and that Board stated:

> That the proposed enforcement procedures would be more expeditious than the present procedure without adversely affecting the rights and safeguards to which respondents in Clayton Act proceedings are entitled.

The Interstate Commerce Commission, in reporting its views on this proposed legislation to the committee, stated that, while suggesting two clarifying amendments, it was of the opinion that the proposed changes which the bill would make in the Clayton Act to conform it to the Federal Trade Commission Act would expedite the enforcement of agency orders and, therefore, appear to be desirable in the public interest.

The Civil Aeronautics Board, in reporting to this committee, was of the opinion that that agency would welcome the opportunity to support legislation designed to accomplish the finalization of Clayton Act orders.

The Federal Communications Commission stated that the bill—

> will aid all commissions and boards affected thereby. This Commission, therefore, endorses the proposed legislation.

The committee hopes that the agencies affected by this proposed legislation will continue their efforts to issue orders which are as definitive as possible.

The committee is in agreement with the expressions of views favoring this legislation offered to the committee by the various interested agencies. The committee believes that this legislation will strengthen the enforcement provisions of section 11 of the Clayton Act and, accordingly, recommends favorable consideration of S. 726, as amended.

Attached hereto and made a part hereof are the reports submitted by the Interstate Commerce Commission, Federal Reserve Board, the Civil Aeronautics Board, and the Federal Communications Commission on S. 721 of the 85th Congress.

U.S. GOVERNMENT PRINTING OFFICE: 1958

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, *Petitioner*

v.

JANTZEN, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR JANTZEN, INC.

QUESTION PRESENTED

Whether the Finality Act of 1959, which abolished the existing procedure for review and enforcement of Clayton Act cease-and-desist orders and substituted therefore a more expeditious procedure, contains not only the clearly expressed exception for review and enforcement proceedings previously initiated but also an implied exception for all orders issued before its enactment.

THE STATUTE INVOLVED

The Finality Act of 1959, Public Law 86-107, 73 Stat. 243, which repealed certain portions of Section 11 of the Clayton Act, 38 Stat. 734, now in part at 15 U.S.C. 21 (1963 ed.), is set out in full as Appendix B of petitioner's brief at pp. 34-39. Section 11 of the original Clayton Act, having been repealed on July 23, 1959, does not appear in the current edition of the U. S. Code, but it may be found at 15 U.S.C. 21 of the 1958 edition, and is set out as Appendix A to petitioner's brief at pp. 30-33.

STATEMENT

The statement of the case contained in petitioner's brief is not disputed and is adopted here with two exceptions. First, petitioner's brief (p. 2) suggests that there are generally descriptive facts in the record as to respondent's business. This is not correct.[1] Secondly, petitioner's statement of the case neglects to mention one entire chapter in the history of this proceeding—

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[1] The record contains *no* evidence of any facts about respondent or its business activities or methods other than those facts contained in a stipulation between counsel executed in November 1958 (R. 4-5), those contained in a stipulation between counsel in November, 1964 (R. 49), and those contained in an affidavit and exhibits (R. 22-36) submitted by respondent in January 1965. The record in this case contains no evidence that respondent distributes "to some 12,000 retail outlets located throughout the world", as stated by petitioner (Pet. br. 2). This was alleged in the Commission's complaint in 1958 (R. 1), but these allegations, except as to "jurisdictional facts," whatever they may be (R. 4, 7), were never admitted, denied, or established judicially or administratively in any fashion and cannot properly be relied upon now for any purpose in this proceeding. There is no way of knowing from this record, either as of today or at any date in the past, by what methods respondent's products are distributed, to whom, in what number or where.

respondent's application for informal disposition of the matter filed in January 1965, with its showing of complete current compliance with Section 2(d) of the Clayton Act. (R. 21-36).[2]

SUMMARY OF ARGUMENT

1. In 1959, after nearly forty-five years of experience with the cumbersome enforcement procedure in Section 11 of the Clayton Act, at the repeated urging of the Federal Trade Commission, Congress provided for more expeditious enforcement of orders issued under Section 11 of the Clayton Act. Congress accomplished this clearly and unambiguously in the Finality Act of 1959, which repealed the old method of procedure formerly contained in Section 11 of the Clayton Act and substituted a more expeditious enforcement procedure. Congress also provided, in Section 2 of the Finality Act, that the new procedure should "have no application to any [review or enforcement] proceeding initiated before the date of enactment of this Act" and "each such proceeding shall be governed by the pro-

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[2] At the investigational hearing in 1964, following a statement of reservations as to jurisdiction (R. 52-53), respondent attempted to offer additional facts (R. 54) to assist the Commission in exercising its discretion as to the proper disposition of the matter. Counsel for the Commission objected, and, in the interest of expediting the proceeding, respondent withdrew the offer (R. 63). Upon the matter's having been reported by the hearing examiner to the Commission, respondent filed an Application for Disposition under Section 1.21 of the Commission's General Procedures, which provides for informal non-adjudicatory disposition on the basis of voluntary compliance. Counsel for the Commission answered (R. 37-39), and on April 9, 1965, the Commission issued an Order Denying Respondent's Request For Informal Disposition without explanation (R. 39).

visions of such section as they existed on the day preceding the date of enactment of this Act."

Congress intended to provide for the more expeditious enforcement of Clayton Act cease-and-desist orders, and it did so without equivocation. Convinced of the worthlessness of the old method of enforcement, Congress abolished it except as to a limited category of cases explicitly provided for in Section 2. The Commission recognized at the time that, by Congress' inclusion of Section 2, Congress wrote off enforcement through the courts of appeals of the old orders as to which review or enforcement proceedings had not already begun. There is no basis for the Commission's current request that this Court rewrite the Finality Act to provide that the old method of procedure shall be preserved, not only as to cases in which review or enforcement proceedings had been initiated, as Congress provided, but as to *all* orders whether or not review or enforcement proceedings had been initiated at the time of the Finality Act's enactment.

2. Clayton Act enforcement will be strengthened by affirming the court of appeals' decision. The Finality Act did away with a poor method of enforcement. A clear affirmation by this Court that the court of appeals' decision is correct will free the Commission to proceed by way of the more expeditious method.

ARGUMENT

INTRODUCTION

The Federal Trade Commission seeks reversal of a unanimous decision of the Court of Appeals for the Ninth Circuit. The Commission's brief assembles a variety of artfully phrased arguments attacking the decision of the court of appeals. This effort would be

unnecessary but for a nostalgic attachment[3] to an antiquated method of procedure for which Congress in 1959 explicitly provided a better substitute.

Petitioner asks this Court, in the face of a clear and unambiguous congressional enactment to the contrary, to declare that an "unwieldy" (Pet. br. 17) and "laborious, time-consuming and very expensive" (Pet. br. 15) method of procedure shall be preserved. Petitioner would have the Court speculate about an unexpressed intention of Congress, masking a lack of evidence of any such intention by use of the words "obvious" (Pet. br. 14) and "plain" (Pet. br. 21), when the one obvious or plain thing is that the statute itself is so clear that there is no need to resort to speculation about congressional intent.

Petitioner further asks the Court (Pet. br. 22) to ignore a settled and sensible rule of statutory construction, citing no authority to support this request and providing the Court with not the slightest assistance in thinking through the possible problems which might be raised if the Court were to decide in this case that an amendment by substitution does not explicitly re-

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[3] There seems no better way to describe it. As one member of the Commission has stated: "If, as the Commission is seeking, the Supreme Court should reverse the decision of the Court of Appeals in Jantzen, the Commission would have 'won' the right to go back to the old, unsatisfactory pre-1959 enforcement procedure. As the Court of Appeals pointed out in footnote 11 of its opinion, the old procedure was characterized in the hearings before Congress as 'ineffectual; cumbersome; lacking teeth; awkward, slow, and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic.'" Letter of Commissioner Elman of June 23, 1966, to Senator Sparkman, set out as Appendix A to respondent's Memorandum in Opposition.

peal that part of the statute for which the new language is to be substituted.

Furthermore, petitioner, unwilling to rely completely on its argument for *non*-repeal (having itself taken a different tack in the court below)[4] makes a 180 degree turn and argues in part II of its brief that the 1959 statute *did* repeal the old provisions but that an 1871 statute preserves jurisdiction. To accomplish this, petitioner asks this Court to adopt at least one, if not both (it is not quite clear which) of two proposed meanings for the term "liability" which strain rationality beyond the breaking point. After marching for twenty-five pages to the drums of speculative congressional intent behind a 1959 statute which is clear on its face, petitioner changes the beat and urges a completely inconsistent theory that an 1871 statute should be stretched to cover a situation which Congress in 1871 "obviously" had no intention of including. For obvious reasons, petitioner makes not even the slightest reference to congressional intent behind the 1871 statute.

We submit that petitioner has not offered any authority or any respectable theory for reversal of the carefully-reasoned opinion of the court of appeals. The Commission provides no answer to the question—"What words of what statute should be construed in what manner in order to achieve any result other than the one reached by the court of appeals?" Is the Commission suggesting that the words "amended to read as follows" should not be construed to mean "amended

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[4] "We recognize, of course, that Public Law 86-107 *repealed* the old procedures with regard to future orders, as the courts have held." Reply brief for Petitioner, p. 5 (emphasis supplied).

to read as follows"? And, if not, then what should they be construed to mean? Or is the Commission suggesting that the words in Section 2 of the Finality Act preserving the old procedures as to "any procedure initiated before the date of enactment of this act under the third or fourth paragraph of Section 11" should be construed to cover any proceedings initiated before or *after* the date of enactment of this act? Or is the Commission suggesting that some particular word or words should be inserted by this Court in Section 11 of the Clayton Act as it now reads in the U. S. Code? Or is the Commission suggesting that some word or words should be inserted by this Court in the Finality Act of 1959?[5] In any event, if the Commission wants the Clayton Act or the Finality Act rewritten, it should turn to Congress and not to the courts.

We submit that respect for law, logic, language, and good sense all require affirmance of the court of appeals' decision. Furthermore, we submit that this result is fully consistent with stated policy objectives of the Congress and this Court.

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[5] The court of appeals explicitly rejected this suggestion (R. 85). "What we are now asked to do, in substance, is to insert into section 2 of the Finality Act a provision making it applicable to outstanding cease and desist orders as to which proceedings had *not* been initiated, before the date of enactment, under the third and fourth paragraphs of the former section 11 of the Clayton Act, and this in spite of the fact that the section applies only where such proceedings *have* been initiated. Whether the omission of such a provision was intentional, as it may have been, or inadvertent, as it may also have been, is immaterial. It is not the business of courts, under the guise of construction, to put into a statute what Congress has left out. (*Hanover Bank* v. *Commissioner*, 1962, 369 U.S. 672, 677-78; *Iselin* v. *United States*, 1926, 270 U.S. 245, 251; *Elbert* v. *Poston*, 1925, 266 U.S. 548, 554.)"

I. THE COURT OF APPEALS' DISMISSAL FOR LACK OF JURISDICTION WAS CORRECT IN BOTH LAW AND POLICY

A. Repeal Is Clear on the Face of the Statute.

After careful review of the statutory language, the court of appeals concluded that "repeal in this case was express." (R. 81) The Finality Act has two sections. Section 1 provides

(a) for "redesignation" of the first and second paragraphs of Section 11 of the Clayton Act as subsections (a) and (b) of such section,

(b) that the last sentence of the second paragraph of Section 11 of the Clayton Act, which has now been redesignated as subsection (b), is "amended to read as follows" with new language to be substituted, and

(c) that the third, fourth, fifth, sixth and seventh paragraphs of the old section "are amended to read as follows" with new language for substitution as subsections (c) through (l).

Section 2 of the Finality Act provides that the amendments made by Section 1 "shall have no application to any proceeding initiated before the date of the enactment of this Act under the third [enforcement] or fourth [review] paragraph of section 11" of the 1914 Clayton Act. Section 2 provides further that "each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act."

What did Congress accomplish by the adoption of this language?

1. As to proceedings for enforcement or review initiated prior to the date of enactment of this

Act Congress stated (a) that the new method of procedure should *not* apply and (b) the old method of procedure *should* apply.[6]

2. As to review or enforcement proceedings initiated *after* the date of enactment of this Act, Congress provided the enforcement method specified in Section 1.[7]

There is no need to speculate about the intention of Congress when it adopted the Finality Act. Use of

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[6] If petitioner's argument were correct, there would be no need for the second sentence in Section 2.

[7] As to review or enforcement proceedings not initiated prior to the date of enactment of this Act, Congress *could* have left (but did not leave) to the enforcement authorities the alternatives (a) to make use of the new procedure for civil penalties, or, if they chose, (b) to continue use of the old provisions in Section 11 of the Clayton Act, in the words of Section 2 of the Finality Act, "as they existed on the day preceding the date of enactment of this Act." (This is hardly language which Congress would use if it intended that such provisions would continue in effect for any purpose other than that specifically provided.)

As to review or enforcement proceedings not initiated before the date of enactment of this Act, Congress *could* have provided a distinction between any such proceedings in connection with orders issued at any time prior to the date of enactment of the Finality Act and orders issued following the date of enactment of the Finality Act, or it *could* have provided a distinction between orders issued, say, ten years prior to the date of the enactment of the Finality Act and thereafter or even ten years subsequent to the date of enactment of the Finality Act and thereafter.

In fact, Congress did not make any such distinctions.

On page 16 of petitioner's brief there appears the following: "The Act did not, of course, provide explicitly for the 379 then-outstanding orders which had never been reviewed in courts of appeals and which, because of the absence of any limitations provisions of the 1914 Act, were still subject to judicial review." Why "of course"? If there were anything to petitioner's argument that Congress intended to retain the old procedures for their enforcement, certainly Congress could and would have said so.

the terms "redesignated," "amended to read as follows" (in two places), and reference to "the provisions of such section as they existed on the day preceding the date of enactment" all march in the direction of what the court of appeals found was the "normal rule" of statutory construction, to read such language as an express repeal of provisions omitted. We submit that this is the appropriate rule for this Court to follow.

Although petitioner attempts to belittle the reasoning of the court of appeals in following this "normal rule," characterizing the court of appeals' approach as "highly formalistic" (Pet. br. 22) and "doctrinaire" (Pet. br. 23), petitioner does not deny that the court of appeals' reading is indeed "the normal rule of statutory construction." Nor does petitioner offer even the vaguest suggestion as to an alternative rule or even an alternative reading.[8]

Petitioner's brief does attempt to bolster the unsupported argument in its final paragraph (Pet. br. 24) by suggesting that a "sensible construction of the statute, which would give true recognition to the principle that it ought not be construed so as to ascribe arbitrary motives to the legislators, would compel the

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[8] For what rule does petitioner contend? Perhaps for the rule, as suggested by Mr. Justice Stewart dissenting in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 301, that "the Government always wins." Should the rule be the opposite of that adopted by the court of appeals? What would be the result of adopting the rule contended for by petitioner? Or should there be no rule at all? What would be the result of adopting such a non-rule in cases other than the single one at bar?

Surely the burden is on petitioner to come forward with something more if it seeks reversal of the court of appeals on this point.

opposite result from that reached by the court below." Petitioner supports this splendid generality by a single specific: an alleged "arbitrary" distinction which it says would result from adoption of the court of appeals' reasoning—a distinction between pre-1959 orders which had been reviewed in the appellate courts and those which had not been reviewed.

The distinction which Congress made in Section 2 between reviewed and unreviewed orders is not "arbitrary" but sensible. Where courts' and litigants' time had already been invested in evaluation of evidence and appropriateness of the order, it is reasonable to conclude that Congress would wish to preserve the old method of enforcement, but, where there had been no such review, Congress did not preserve the old method.[9]

Furthermore, the distinction urged by petitioner may be only theoretical. Petitioner offers no reason to believe that it will seek to enforce a previously-reviewed order under old Section 11. It may be that the Commission should and will conclude that it would be more expeditious to use the new method.

If an enforcement proceeding had been initiated prior to repeal, there was good reason to continue the proceeding to its conclusion or to let stand an order of enforcement. And, if respondent did not seek review and the Commission never brought a proceeding for enforcement, it was not unreasonable to conclude that respondent had simply complied with the order. (See *New Standard Publishing Co.* v. *Federal Trade Com-*

[9] Of course, the firm which sought review and obtained reversal of the Commission's order is completely free of the old order.

mission, 194 F. 2d 181.) And it is reasonable to conclude that as to such instances Congress would see no reason to preserve the old method of enforcement.

In the Wheeler-Lea amendments, as in the Finality Act amendments, Congress explicitly provided for the distinction which petitioner (Pet. br. 25) characterizes as "arbitrary," for, as explained in the very opinion which petitioner cites,[10] the Wheeler-Lea Amendments provided that where respondent petitions for review and the court affirms, it shall issue its own order commanding obedience to the terms of the Commission's order, thus putting the respondent who seeks review in a worse position than one who does not.

Petitioner's brief argues from "obvious congressional intent" (Pet. br. 14) and "plain legislative intent" (Pet. br. 21) that Congress would not have wished to do what the Finality Act clearly did, that is, to repeal the provisions for a "laborious, time-consuming, very expensive" (Pet. br. 15), "cumbersome" (Pet. br. 9), "unwieldy" (Pet. br. 17) method of enforcement. Petitioner leans heavily on the word "strengthen" in the Senate committee report[11] and finds some inconsistency between the objectives of the Senate committee and the decision of the court of appeals. But the committee report did not state a belief that the legislation would, as argued by petitioner, strengthen Clayton Act enforcement *generally*, but that it would strengthen *the enforcement provisions*

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[10] *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 479.

[11] "The committee believes that this legislation will strengthen the enforcement provisions of section 11 of the Clayton Act and, accordingly, recommends favorable consideration of S. 726, as amended." (Pet. br. 55)

of Section 11. And the preamble of the Finality Act contains a clear statement of purpose "to amend Section 11 of the Clayton Act to provide for the more expeditious enforcement of cease-and-desist orders issued thereunder."[12]

On reading petitioner's brief, a number of questions suggest themselves, questions difficult or impossible to answer under petitioner's theory, but clearly answered by the court of appeals. For example, Section 2 describes the proceeding to which the amendments made by Section 1 shall have no application as those "initiated before the date of enactment of this Act." If, as petitioner seems to contend, the amendments of Section 1 would have had no application to the proceeding at bar anyway (a proceeding *not* initiated before the date of enactment); what possible reason was there for using this language? Petitioner's brief contains only hints of petitioner's position on this question. Petitioner states (Pet. br. 28) "the purpose of Section 2 was simply to indicate Congress' intent that the new procedures were to be prospective only."[13]

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[12] The preamble also contains the phrase "and for other purposes." One other purpose might have been to eliminate a "laborious," "time-consuming," "very expensive," cumbersome," and "unwieldy" method of procedure.

[13] Petitioner does not make clear from what point of reference in time the "prospectivity" for which it contends should begin. Petitioner refers to "pre-1959 orders" (Pet. br. 32), but it is unclear whether the reference is to the date of enactment of the Finality Act or to some other date. If petitioner is referring to the date of the Finality Act's enactment, it may have difficulty accounting for those matters which were pending before the Commission itself on July 23, 1959, and later resulted in a cease-and-desist order (or on which the Commission had only recently acted by the issuance of a cease-and-desist order but no review or enforcement proceeding had yet been initiated on the day of enactment

But if it had been Congress' intent that the procedures were to be prospective only, and if the purpose of Section 2 was "simply" to indicate this intent, Congress could simply have exempted from Section 1 all proceedings previously initiated, including those previously initiated under the third or fourth para-

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of the Finality Act), particularly in view of the Commission's News Release of July 28, 1959, set out as Appendix A to this brief.

The interpretation announced in the news release was made the basis for disposing of pending compliance investigations. For example, in one case staff counsel for the Commission moved to close the hearings on the ground that in view of the Finality Act "the Commission can on longer apply to the Court [of Appeals] for a decree of enforcement * * *"; the Commission itself terminated that investigation with a ruling that "further proceedings for enforcement of said order to cease and desist must be governed by the provisions of * * * [the Finality Act] rather than by the proceedings contemplated" at the commencement of the investigation. (Brief for Appellants, p. 4, *Federal Trade Commission* v. *Nash-Finch Co.*, 288 F.2d 407 (C.A.D.C.)).

By mid-1960 three cases turning upon the validity of the Commission's position were pending in the D. C. Circuit. (A fourth case had been dismissed by consent. *North American Philips Co.* v. *Federal Trade Commission*, No. 15374, October 30, 1959.) The Commission, joined by the Department of Justice, argued that the revised enforcement procedure applied to previously-issued orders. Relied upon were both "the plain language of the amendment" (Brief for Respondent, p. 7, *Schick Inc.* v. *Federal Trade Commission*, 288 F.2d 407)—"its plain terms" (Brief for Respondent, p. 24, *Sperry Rand Corp.* v. *Federal Trade Commission*, 288 F.2d 403)—and "the legislative history" (Brief for Appellants, p. 21), *Federal Trade Commission* v. *Nash-Finch Co.*, 288 F.2d 407).

The premise of the Government's position that Congress had intended to apply the revised procedure to old orders was that Congress had also intended to repeal the original provisions in their application to such orders. It is clear that, contemporaneously with the passage of the Finality Act, the Commission and the Department of Justice—the expert agencies entrusted with enforcement—interpreted the Act as repealing the original Clayton Act enforcement provisions as to previously-issued administrative orders (except those as to which proceedings had been initiated before the date of enactment).

graphs. But Congress excluded from the scope of Section 2 pending proceedings on complaint as to which no review or enforcement proceedings had yet been initiated.

We submit that the decision of the court of appeals satisfactorily accounts for the language of Section 2 in its use of the terms "any proceeding initiated" and "under the third or fourth paragraph", while petitioner's theory does not. It appears to be petitioner's contention that the court of appeals would have jurisdiction here *whether or not* Section 2 had been included in the Finality Act at all. Petitioner seems to argue that Section 1 did *not* repeal the old enforcement provisions. But petitioner also contends that Section 1 *did* repeal the old provisions prospectively but not retrospectively, or as to all orders issued subsequently but not previously.[14] In any event, petitioner seems to be arguing that the purpose of Section 2 was not to indicate when the old procedures did apply but "simply" to indicate (Pet. br. 28) when the new procedures did *not* apply. But if, as petitioner contends, the amendments of Section 1 do not apply to any order issued prior to the date of the Finality Act, there would have been no need to make specific provisions for continuance of the old provisions as to those proceedings previously initiated for review or enforcement. Petitioner's argument assumes that a statute which it says does not apply to *any* old orders included a specific provision in order to make it specifically inapplicable to *some* old orders.

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[14] Petitioner's brief says such "a reading" can be "supported" (br. 22). In the court of appeals petitioner argued: "We recognize, *of course*, that Public Law 86-107 *repealed the old procedures* with regard to future orders." Reply brief 5 (emphasis supplied).

B. There Is Nothing in the Legislative History Which Suggests That Congress Intended the Statute To Mean Anything Other Than What It Says—the Old Method Is Repealed Except as to a Limited Class of Cases.

We submit that no consideration of congressional intent is necessary, warranted, or of any assistance in any respect in analyzing the issues in this case in view of the clear meaning of the statute on its face. There is no reason to suppose that Congress intended anything other than what it so obviously accomplished:

(a) abolition of a cumbersome procedure with substitution of a more expeditious one, and

(b) preservation of the old procedure in a limited category of cases—those in which, by reason of the previous initiation of a review or enforcement proceeding, an investment had already been made by litigants and the courts.

The simple fact is that the legislative history does not cut one way or the other, and the obvious and plain language of the statute itself should be looked to rather than speculation about unexpressed congressional intent.[15] On a plain reading of the statute, there

[15] The Commission, which certainly followed the legislative history closely and itself participated in making much of it, upon passage of the Finality Act, concluded that the former enforcement procedure had been abolished. The court of appeals found that when the Finality Act was adopted, "the Commission strongly urged that the former enforcement procedure . . . was no longer in effect." (R. 81) As another court of appeals has recently noted, "anyone who is at all familiar with the closeness of the relationship between executive departments and Congress during the consideration by the latter of a change in a major statute administered by the former, knows that their guesses are far from uninformed" (*Morrison Milling Co.* v. *Freeman*, 365 F.2d 525, 529).

are two conceivable interpretations of the scheme of enforcement which was to follow the effective date of the amendment, either

A. (1) "finality" as to orders issued thereafter, with consequent enforcibility through suits for civil penalties in the district courts,

(2) the old method of enforcement to remain for those orders as to which review or enforcement proceedings had already been initiated, and

(3) abandonment of the old method of enforcement as to all other orders issued prior to the amendment with total reliance on the new more expeditious procedure

or

B. (1) "finality" as to all orders, old and new, ever issued under the Clayton Act,[16] except

(2) the old method of enforcement to remain for those orders as to which enforcement proceedings had already been initiated.

Either of these schemes would have made a sensible improvement and would have provided, in the words of the preamble, "for the more expeditious enforcement of cease-and-desist orders" issued under Section 11 of the Clayton Act. The Court of Appeals for the Ninth Circuit chose "A" above. Petitioner argues, albeit not very consistently, not for "B", which it pre-

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[16] The Wheeler-Lea amendments of 1938 to the Federal Trade Commission Act provided for just this explicitly with respect to Federal Trade Commission Act orders. The Finality Act of 1959 conspicuously omitted such provisions.

viously sought in the D.C. Circuit and abandoned,[17] but for some third scheme of dual proceedings; one for old orders, another for new.

If any inquiry is made as to congressional intent, one finds that there is nothing in the legislative history to suggest that Congress intended other than to establish a single mode of enforcement for all Clayton Act orders whenever issued, rather than one method for orders issued at one time and a different method for orders issued at some other time. Although it appears that this is not now petitioner's position, it used to be. Attorneys for the Commission, joined by the Department of Justice, in their brief on appeal from a judgment of the U. S. District Court for the District of Columbia to the U. S. Court of Appeals for the District of Columbia Circuit in *Federal Trade Commission* v. *Nash-Finch Company, supra,* included the following p. 21: "We submit that both the legislative history and the language of the amendment itself point to the Congressional purpose of establishing a single mode of enforcement for all Clayton Act orders, whenever issued."

Prior to the 1959 Finality Act's adoption, as petitioner indicates (Pet. br. 11-12), Congress had had before it several bills which would have given to old orders the same finality as the amendments have given to subsequent orders.[18] These provisions paralleled the 1938 Wheeler-Lea amendments to the FTC Act. Most of the House bills included these provisions; the

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[17] Petitioner did not seek review of the D.C. Circuit cases, perhaps because Congress' failure to follow the Wheeler-Lea precedent made petitioner's position in those cases so untenable.

[18] H. R. 3402, 81st Cong., 1st Sess.; H. R. 6748, 84th Cong., 1st Sess.; H. R. 8682, 85th Cong., 2d Sess.

Senate bills[19] did not. The Senate bill was passed first, and the House accepted it. Congress may well have adopted the statute which it did adopt in order to avoid possible opposition to any bill and to insure the development of an expeditious method of procedure in the future. That Congress showed little concern for the old orders is hardly remarkable. Many, if not all, of the old orders were widely regarded as only boiler plate adoptions of statutory language;[20] many (like the one in this case) had been issued by consent without any fact-finding proceeding. And, as the Senate report shows, Congress had been led to believe that there would be no more, and probably less, difficulty for the Commission to issue a new order where called for than to enforce an old one, since Congress had been persuaded that, under the old procedure the Commission was required to "conduct three successive investigations and . . . on three successive occasions prove *violations of the law.*" (Pet. br. 53) (Emphasis supplied)

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[19] S. 2205, 84th Cong., 1st Sess.; S. 721, 85th Cong., 2d Sess.; S. 726, 86th Cong., 1st Sess. See also H. R. 13530, 85th Cong., 2d Sess; H. R. 432, 2977, and 6049, 86th Cong., 1st Sess.

[20] "Eventually, however, we believe that cumbersome Clayton Act enforcement provisions should be amended to parallel Federal Trade Commission Act procedures. This should be done when the presently exorbitant Federal Trade Commission Act penalty provisions have been reduced and the Commission makes more specific its orders, particularly in Clayton Act Section 2 cases." Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, page 374.

C. The Statute, as Written, Will Assist the Commission To Develop an Effective Enforcement Program.

Petitioner retreats substantially from the position it took before the court of appeals that, unless its views are accepted, "forty-five years of Clayton Act enforcement and almost 400 orders to cease-and-desist would be wiped from the books" and that Congress "did not intend to grant amnesty to the almost 400 law violators under order." (The court of appeals rejected these contentions on both legal and practical grounds (R. 84-85)).

Petitioner now urges this Court to rewrite an Act of Congress because, according to the petitioner, it is "improbable" (Pet. br. 21) that Congress would have wished the result reached by the court of appeals. Petitioner argues (Pet. br. 21) that the issue turns not on how substantially "the Commission's enforcement power"[21] was affected by repeal of the old enforce-

[21] An underlying assumption of the Commission's argument seems to be that by some "obvious" or "plain" intent which cannot be discussed rationally and which obscures all analysis in a fog of generality, Congress meant by the Finality Act to increase the "*power*" of the Federal Trade Commission and that since the court of appeals' decision does not clearly serve to increase the Commission's power, this must not be what Congress wanted, and, therefore, this Court should somehow rewrite the statute. This view is consistent with and springs from the view held by some that Robinson-Patman Act enforcement is a matter of the good guys against the bad guys, the cops against the robbers, the cowboys against the Indians. The bad guys are the violators and the good guys are the law enforcers. By passing the Finality Act, Congress meant to help the good guys, but the court of appeals' result might help the bad guys, and therefore, the court of appeals should be reversed.

We submit that this is not the intelligent way to look at the issue, if indeed there is one, presented by this case. For one thing, it has never been proven that this respondent ever violated the

ment provisions but "rather whether there is enough of a difference to render it improbable that Congress would have wished this result." And petitioner submits "that Congress would not have voluntarily chosen to deprive the Commission of either the psychological force which an enforcible pre-1959 order had or the reduced burden which rested on the Commission in enforcing orders rather than statutes." We submit (1) if this argument has any merit it should be directed to Congress and not to this Court; and (2) if this Court were sitting as a legislature, petitioner's argument would be unpersuasive even so.

As to the "psychological force" which a pre-1959 order might have retained if Congress had passed a different statute in contrast to that which such an order now retains, the threat of a new proceeding under the current procedure, with the possible result of an order directly and more expeditiously enforcible in district courts through civil penalty actions in which the only issues considered are whether the Commission had jurisdiction to issue the order and whether it has been violated, has as much as or more deterrent effect against future violations of the Clayton Act than the possibility of enforcement through the cumbersome

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Robinson-Patman Act prior to 1960. And the only evidence of record as to the current state of affairs is that contained in the unrebutted showing of respondent (R. 22-36) of a complete program for compliance with the law.

In providing for the more expeditious method of enforcement in the Finality Act, Congress did not necessarily intend exclusively to increase or decrease the *power* (or alternatives) of the Federal Trade Commission or to lighten or make heavier its burdens but could as well have intended to relieve both *respondents and the Commission* of the burden of a "laborious", "time consuming", "very expensive", "cumbersome" and "unwieldy" procedure.

procedure of the old statute. We submit that it is improbable that Congress would not have recognized this. Congress would not have voluntarily chosen and did not choose to preserve what one commissioner has described as "an archaic and ridiculous method of enforcement whose total demise the Commission should be the first to cheer" (Respondent's Memorandum in Opposition 9a).

As to the "reduced burden" which might have rested on the Commission in enforcing old orders rather than proceeding anew to prove a violation of the statute, we submit that there are very few such cases, if any.[22] Certainly the case at bar is not one,[23] and petitioner has done little or nothing to provide the Court with a basis for answering the question petitioner says needs to be answered—what difference does

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[22] The distinction between proving a violation of law and proving a violation of an order is a latter-day invention, apparently not suggested to Congress during its consideration of the Finality Act and apparently not taken very seriously even now. As the Senate report stated (Pet. br. 53), the old procedure required that "the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations *of the law.*" (Emphasis supplied) Petitioner's brief (p. 18) contains the same articulation—"a third violation *of the Act.*" (Emphasis supplied)

[23] The order (R. 16), which was issued by consent and without findings, merely repeats the statutory prohibition of Section 2(d) of the amended Clayton Act, 15 U.S.C. § 13(d). Proof of violation of the statute shows violation of the order and vice versa. The Commission would have had no greater burden in this case in July 1964 when it resolved to investigate respondent's compliance (R. 11) if it had started an entirely new proceeding rather than attempted to enforce the old order through the old method. Why petitioner chose to proceed as it did in this particular case is most difficult to understand.

it make that Congress abolished the old method.[24] We submit that the answer is that Congress wisely abandoned the old procedure and that the Commission would better promote expeditious and effective Clayton Act enforcement by doing the same.

We submit that the truly meaningful orders issued prior to 1959 have been explicitly preserved by Section 2 of the Finality Act and that it is not "improbable" (Pet. br. 21) but probable that Congress,

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[24] On p. 20, fn. 28, petitioner cites five cases. Two were affirmed in court and thus specifically preserved by Section 2 of the Finality Act. The other three were consent orders in which the proceeding before the Commission included no finding of violation.

Petitioner submits as Appendix D to its brief what purports to be a list of existing corporations against which there are outstanding pre-1959 orders. It should be pointed out that, except for FTC Docket 4571 on page 44 of petitioner's brief, the statutory subsections have not been indicated. This results in the obscuring of just how many proceedings were actually price discrimination proceedings under Section 2(a), in which petitioner contends the orders may have done something more than just repeat the statutory prohibition, and how many were brokerage proceedings under Section 2(c) or discriminatory allowance proceedings under Section 2(d), such as this case, where Commission orders merely repeat the words of the statute. For example, FTC Docket 6420 (Pet. br. 47) appears as ten Section 2 orders. In fact, a single boiler plate 2(c) consent order against unlawful brokerage is all these ten lines amount to.

Appendix D of petitioner's brief also fails to indicate the fact that consent proceedings since 1954, unlike those prior to that time, have not required any findings of fact but have included a waiver by the respondent of rights to challenge the validity of the order (R. 7). Most of the orders issued after 1954 were either by consent or have been affirmed. This is true of all but one of the orders on page 49 and all of the orders cited in fn. 28 on p. 20 of petitioner's brief.

Also, the indications of affirmance or enforcement as to Dockets 6641, 6468 and 6470 (Pet. br. 48) are simply not correct. The affirmances were in subpoena litigation. The orders were issued by consent and never reviewed.

in evaluating the compromise necessary to achieve its basic purpose of providing for the more expeditious enforcement of cease-and-desist orders issued under Section 11 of the Clayton Act, had little difficulty in abandoning the old procedure for all but that limited category of cases specifically provided.[25]

The Commission has not explored the alternatives available to it for development of an effective enforcement program.[26] It is not true, as petitioner's brief

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[25] The court of appeals went on to suggest: "All that the Commission has to do where it finds a violation of an old cease and desist order is to enter a new cease and desist order." (R. 86) Commissioner Elman writes: "What, then, would be the actual practical consequences if the Jantzen decision were accepted and followed? As I see them, they are all in the direction of facilitating prompt and effective enforcement of pre-1959 Clayton Act orders. As already indicated, the validity of these orders and their *res judicata* effect has in no way been altered or diminished. Nor has the Court of Appeals changed or increased the Commission's burden of proving a post-order violation after conducting a judicial-type hearing on that issue. Under *Jantzen* a respondent is entitled to such a hearing on that issue before a new order, final under the 1959 amendments made by the Finality Act, is entered by the Commission. But, in that respect, there is no difference from the old pre-1959 procedure, under which a respondent was also entitled to such a judicial-type hearing before a decree enforcing the order could be entered." Respondent's Memorandum in Opposition 4a. See also the Commission's recent decision in The Elmo Company, FTC Docket 5959 (November 18, 1966), setting aside a 1952 consent order pursuant to *Elmo Div. of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (1965).

[26] One member of the Commission has stated: "I believe it would be *more* easy and effective for the Commission to enforce pre-1959 Clayton Act orders under the procedure sanctioned by the Court of Appeals in the *Jantzen* case than under the old pre-1959 Clayton Act procedure." Letter of Commissioner Elman of June 23, 1966, to Senator Sparkman, set out as Appendix A to respondent's Memorandum in Opposition. The letter contains a full statement of Mr. Elman's reasons for his conclusion.

implies, that respondents to pre-1959 orders will "be free to violate the orders against them with impunity" unless the court of appeals is reversed.[27] The court stated (R. 85):

> "The Commission is indulging in hyperbole. We do not, by our holding, wipe forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist from the books, nor do we grant amnesty to any law violator, much less to 400. The orders are still there, and still as valid as they ever were. Part of the Commission's function has always been to educate and to persuade. The orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were. There is a presumption that people obey the law; we would suppose that it applies to obedience to FTC orders.

We submit that a declaration of this Court, in keeping with what the statute clearly states and the court of appeals has so emphatically affirmed, will not weaken Clayton Act enforcement but, by liberating the Commission from an ineffective, cumbersome, awkward, slow, laborious, time-consuming, expensive, inadequate and wasteful procedure will assist the Commission to move in the direction of using its limited resources on the more effective, less cumbersome, better procedures now provided in Section 11 of the Clayton Act.

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[27] On July 23, 1959, ten petitions to review and *one* enforcement action were pending. As of that date thirty-one orders had been affirmed and enforced; nineteen had been affirmed only.

D. 1 U.S.C. § 109 Has No Application To This Case.

Petitioner argues that the 1871 General Savings Statute preserves the authority of the courts of appeals to enforce pre-Finality Act orders.[28] Petitioner first placed some reliance on the General Savings Statute in its reply brief below. The court of appeals considered the argument and concluded that the General Savings Statute does not apply. The Court stated: (R. 86-87)

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[28] Petitioner argues (Pet. br. 26) that the construction of the court of appeals would extinguish either or both of two liabilities:

> "*First*, a liability was 'incurred' by respondent, within the meaning of the savings statute, in 1958, when it engaged in the conduct which gave rise to the Commission's complaint against it." • • •
>
> "*Second*, the 1959 consent order itself constituted a 'liability' incurred before the Finality Act was passed."

Neither of petitioner's proposed "liability" theories is acceptable, and petitioner itself recognizes this elsewhere in its brief when it describes the contempt sanction as "no more than a future possibility which applies, under the pre-1959 procedure, only to a third violation of the Act." (Pet. br. 18) We argued below that the consent order involved in this case was never enforcible, even prior to the Finality Act, since it was not issued in accordance with the statutory procedure. The court of appeals did not reach the question of the general unenforcibility of such consent orders.

In any event, Petitioner's argument is certainly misplaced in this case, since is overlooks the fact that the Commission's order of January 16, 1959 (R. 9) was issued pursuant to a stipulation which included the provision: "This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint." (R. 7) Petitioner's reference (Pet. br. 26) to respondent's 1958 "conduct which gave rise to the Commission's complaint against it" has no basis in the record. It has never been established that there was any conduct which gave rise to the Commission's complaint against respondent or that, as petitioner contends, "respondent thereupon became liable to the entry of a cease-and-desist order."

"This proceeding is not based upon a violation that occurred *before* the Finality Act was adopted, but on further violations occurring *after* its adoption in 1960 and 1962. (See *FTC* v. *Ruberoid Co., supra.*) Thus there is not here involved a "penalty, forfeiture or liability" incurred under the former statute. Here, we deal with a statute which formerly conferred jurisdiction on this court, and which, except as to a limited class of cases, of which this is not one, has been repealed. *Cf. De La Rama S.S. Co.* v. *United States,* 1953, 344 U.S. 386, 390. Moreover, the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method. *Cf. United States* v. *Obermeier,* 2 Cir., 1950, 186 F. 2d 243, 251-55 *cert. denied,* 1951, 340 U.S. 951."

The Savings Statute was "meant to obviate mere technical abatement" such as that arising from amendment and repeal of a substantive prohibition (*Hamm* v. *Rock Hill,* 379 U.S. 306, 314; Comment, 54 Georgetown L.J. 173 (1965).[29] Unlike the Labor Board orders

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[29] *De La Rama S.S. Co.* v. *United States,* 344 U.S. 386 relied upon by the Commission (Pet. br. 28), dealt with the effect of repealing the substantive statute under which a "liability" arose and held that if the "liability" survives by reason of the Savings Statute so must the means of enforcing it. Where, as here, it is an enforcement means itself which has explicitly been repealed, the Savings Statute—which on its face relates to repeals of substantive rather than procedural provisions—has no application unless, contrary to the situation under the pre-1959 Clayton Act, susceptibility to the enforcement procedure is itself a "liability." As this Court expressly held in *De La Rama* (344 U.S. at 390):

"When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit. * * *"

in the cases[20] cited by petitioner (Pet. br. 27), which involved orders primarily requiring affirmative acts like reinstating discharged employees and providing back pay,[21] the Clayton Act order against respondent was not subject to judicial enforcement proceedings until it had been violated.

The purpose of the Finality Act was to alter the enforcement procedure under the Clayton Act. The Taft-Hartley amendments, in contrast, made no change whatever in the judicial procedures available to the

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[20] These cases concerned the effect of the 1947 Taft-Hartley amendments on pending Labor Board action against acts constituting unfair labor practices under the pre-Taft-Hartley National Labor Relations Act. *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233 (C.A. 8), *certiorari denied*, 334 U.S. 845, and *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485 (C.A. 6), were already pending in the courts of appeals on the effective date of the Taft-Hartley amendments; and a petition for certiorari to review the decree enforcing the Board's order in *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), *certiorari denied*, 335 U.S. 908, was pending in this Court when the amendments became effective. The pre-amendment orders in *National Garment*, *Mylan-Sparta*, and *Budd*, already pending in court when the Taft-Hartley Act was enacted, were held to be "liabilities" surviving the amendments by reason of the Savings Statute. There was no such ruling in *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131 (C.A. 4). In that case, where the Board's order was issued after the effective date of the Taft-Hartley amendments, the Court held that a "liability" within the meaning of the Savings Statute had been incurred at the time the pre-amendment statute was violated. The Board was found authorized to issue a post-amendment order directing reinstatement and back pay, although its power to issue a prospectively-operating cease-and-desist order was denied on the ground the challenged practices were no longer illegal under the statute as amended.

[21] "Liability" means "the state of being bound or obliged by law to do, pay, or make good something." Black's Law Dictionary 3d ed., p. 1102.

NLRB for the enforcement of its orders, but merely reenacted them. The post-amendment enforcement of pre-amendment NLRB orders was thus no more than an application of the traditional rule that the simultaneous repeal and reenactment of a statute does not disturb its continuity in force.

CONCLUSION

For the reasons stated in the opinion of the court of appeals (R. 76-87), in the letter of Commissioner Elman to Senator Sparkman (Appendix A to Respondent's Memorandum in Opposition), and in this brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

FEDERAL TRADE COMMISSION
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OFFICE OF INFORMATION

EX 3-6800, Ext. 335

NEWS RELEASE

For IMMEDIATE Release on Tuesday, July 28, 1959.

FTC ISSUES PRESS STATEMENT ON PUBLIC LAW 86-107

The Commission today directed the issuance of the following statement relative to Public Law 86-107:

On July 23, 1959, the President signed Public Law 86-107 which amends the Clayton Act to provide for the more expeditious enforcement of orders issued under Section 11 of that Act.

Orders issued under Section 11 of the Clayton Act generally pertain to price and other discriminations among customers, arrangements whereby customers must deal exclusively in the wares of particular suppliers, corporate mergers and interlocking directorates.

The major purpose of P. L. 86-107 is to make final orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board and the Federal Trade Commission issued under Section 11 of the Clayton Act in the same manner in which orders issued by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act become final; that is, upon the expiration of 60 days from the date of service of the order unless petition for review has been filed in an appropriate United States Court of Appeals. The law also incorporates the penalty provisions of the Federal Trade Commission Act by pro-

viding for a civil penalty of not more than $5,000 for each violation of a commission or board order.

This change in the effectiveness and enforcement of orders issued under Section 11 of the Clayton Act does not apply to court proceedings initiated under Section 11 before the date of enactment of P.L. 86-107. Respondents to outstanding orders will have 60 days from the date of enactment, July 23, 1959, within which to petition for court review, and in the event court review proceedings are not instituted such orders will become final upon the expiration of that period.

As a convenient and practical means of giving the widest circulation to interested persons of the substance of this new law, copies of this public press release are being mailed to the last known address of individuals and corporations at present subject to orders issued under the Clayton Act.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

On January 9, 1967, the Court of Appeals for the Second Circuit decided the case of *Federal Trade Commission* v. *Standard Motor Products, Inc.* In that case, as in the instant litigation, the court of appeals had occasion to consider the status of a cease-and-desist order issued by the Federal Trade Commission under the Clayton Act prior to its amendment by the Finality Act of 1959. The Second Circuit's opinion in *Standard Motor* states that "we do not agree with the decision in *Jantzen*. We believe that the old procedure remains available for enforcement of all orders issued before the passage of the Clayton Final-

243-510—67

ity Act." The Second Circuit's views are elaborated in Part I of its opinion, reprinted for the convenience of this Court in the Appendix which immediately follows.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

APPENDIX

United States Court of Appeals for the Second Circuit

SEPTEMBER TERM, 1966

No. 34

(Argued October 24, 1966 Decided January 9, 1967)

Docket No. 30325

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD MOTOR PRODUCTS, INC., RESPONDENT

Before: LUMBARD, *Chief Judge;* MOORE and KAUFMAN, *Circuit Judges.*

* * * * *

LUMBARD, *Chief Judge:*

The Federal Trade Commission petitions for enforcement of its order issued on December 27, 1957, directing the respondent, Standard Motor Products, Inc. (Standard), to cease and desist from charging different net prices to purchasers who compete in the resale of its products, in violation of the Robinson-Patman Act, 49 Stat. 1526 (1936), 11 U.S.C. § 13.

The Commission's petition raises two important questions: (1) whether this Court has jurisdiction to

enforce cease and desist orders issued by the Commission under the Clayton Act prior to the passage of the Clayton Finality Act, 73 Stat. 243 (1959); and (2) whether the Commission correctly rejected Standard's attempted cost justification of its volume rebate system. We hold that we have jurisdiction to enforce pre-1959 orders, but we hold that in dealing with the important issue of the use of average costs of volume classes of purchasers the Commission failed to articulate criteria reconciling the objectives of the cost justification proviso with those of the Robinson-Patman Act as a whole. We therefore deny enforcement of the order.

The Commission's order, 54 F.T.C. 814 (1957), based upon findings that respondent's volume rebates injured competition among purchasers and were not justified as "made in good faith to meet an equally low price of a competitor," 49 Stat. 1526 (1936), 11 U.S.C. § 13(b), was affirmed by this Court, 265 F. 2d 674 (2 Cir. 1959), and the Supreme Court denied certiorari. 361 U.S. 826 (1959).

The Clayton Act as it stood when the Commission's order was affirmed by this Court in 1959 provided no direct sanction for violation of an order so affirmed. The Commission was required to petition the court of appeals for a decree enforcing the order, which would issue if the Court found that the order had been or was about to be violated. *Ruberoid Co.* v. *FTC*, 191 F. 2d 294 (2 Cir. 1951) (*per curiam*), aff'd, 343 U.S. 470, 477–80 (1952). The respondent might then be held in contempt if the enforcement decree was violated. E.g., *In re Whitney & Co.*, 273 F. 2d 211 (9 Cir. 1959). This Court has held that if the Commission before petitioning for enforcement of its order conducted a hearing and found

that the order had been violated, the Court could treat its findings as though it had been appointed as a master to determine whether violations had occurred. *FTC* v. *Standard Brands, Inc.*, 189 F. 2d 510 (2 Cir. 1951); cf. *FTC* v. *Washington Fish & Oyster Co., Inc.*, 271 F. 2d 39 (9 Cir. 1959).

The Commission accordingly directed Standard to file a report of its compliance with the order which this Court had affirmed. In October 1961 Standard introduced new rebate schedules, which for the first time it sought to justify as making "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which [its] commodities are * * * sold or delivered." 49 Stat. 1526 (1936), 11 U.S.C. § 13(a). Although Standard had been informed in June 1961 that the Commission's Division of Accounting had accepted Standard's 1958 cost study on which its new rebate schedules were based, the Commission in March 1962 rejected its compliance report. The Commission directed a compliance hearing, at which Standard presented a 1962 cost study. On the record of the hearing, which was certified to it without any recommendations, the Commission held that Standard had failed to show that its rebates were cost justified, and that it had therefore violated the 1957 order.

I

Standard contends that this Court lacks jurisdiction to enforce the Commission's order because of the passage of the Clayton Finality Act, 73 Stat. 243 (1959), which amended section 11 of the Clayton Act, 15 U.S.C. § 21. We do not agree. The Clayton Finality Act amended the third and fourth paragraphs of section 11, providing for review and enforcement

of Commission orders, "to read as follows," and set forth an expedited procedure under which an order becomes "final" upon affirmance by a court of appeals (subject to Supreme Court review), or, where no review has been sought, automatically upon expiration of the sixty days allowed to seek review by a court of appeals. A showing that the respondent has violated the order is not necessary. Violation of a final order draws a civil penalty of not more than $5,000 for each violation, or for each day of a continuing violation.

Section 2 of the Clayton Finality Act expressly preserved the old procedure as to certain pending "proceedings":

> The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the [Clayton Act]. Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

The original third paragraph of section 11 provided for enforcement of Commission orders by a court of appeals, and the fourth for review of orders at the instance of the respondent. 64 Stat. 1127 (1950), as amended.

Immediately after the passage of the Clayton Finality Act, the Commission contended that orders it had previously issued would become final within sixty days, as though they had been issued on the day the Act was passed. The District of Columbia Circuit held, however, that the new procedure applied only to orders issued after the passage of the Act.

Sperry Rand Corp. v. *FTC*, 288 F. 2d 403 (D.C. Cir. 1961). It noted that the Wheeler-Lea Act, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45, which gave orders under the Federal Trade Commission Act the expedited finality which the Clayton Finality Act extended to the Commission's orders under the Clayton Act, had explicitly provided that outstanding orders should become final under the new procedure. The Supreme Court approved the *Sperry Rand* holding in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 365 n. 5 (1962), and in response to Broch's challenge to the breadth of the order affirmed under the old procedure observed that it could be restricted if and when the Commission petitioned for enforcement.

Despite the *Broch* decision, the Ninth Circuit recently held in *FTC* v. *Jantzen, Inc.*, 356 F. 2d 253 (9 Cir. 1966), cert. granted, 35 U.S. L. Week 3111 (October 10, 1966), that the Clayton Finality Act worked an express repeal of the jurisdiction of the courts of appeals to affirm or enforce orders outstanding when the Clayton Finality Act was passed, except as to pending "proceedings" preserved by section 2. It distinguished *Broch* on the ground that the respondent in that case had petitioned a court of appeals for review under the old fourth paragraph of section 11 before the passage of the Clayton Finality Act, so that a petition for enforcement would be part of a "proceeding" saved by section 2. See 356 F. 2d at 259. The Ninth Circuit's conclusion that enforcement of the order affirmed in *Broch* would be authorized by section 2 is clearly correct, since otherwise Broch's petition for review, expressly saved by section 2, would have had to be dismissed as moot. Cf., e.g., *Muskrat* v. *United States*, 219 U.S. 346, 360–63

(1911).[1] This conclusion is fatal to Standard's contention that this Court lacks jurisdiction to enforce the Commission's order against it, since Standard, like Broch, petitioned for review under the old fourth paragraph of section 11 before the Clayton Finality Act was passed.

We do not rest our holding that we have jurisdiction upon the Ninth Circuit's narrow reading of *Broch*, however, because we do not agree with the decision in *Jantzen*. We believe that the old procedure remains available for enforcement of all orders issued before the passage of the Clayton Finality Act. There is no indication in the legislative history of the Act that Congress intended to relegate any class of outstanding orders to the limbo of unenforceability. Under the *Jantzen* ruling, the stated purpose of the Act, expedition of judicial review and enforcement of Commission orders under the Clayton Act, would be frustrated as to some 400 outstanding orders.

The Ninth Circuit suggested in *Jantzen* that Congress might well have chosen to abate pre-1959 orders because "all that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order," which will become final and enforceable after a single opportunity for review by a court of appeals. 356 F. 2d at 260. But as

[1] Thus the Supreme Court's recognition of the possibility of enforcement in *Broch* was not dictum, because a federal court must dismiss a moot case even if neither party urges it. E.g., *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 475-76 (1916); *California* v. *San Pablo & T. R.R.*, 149 U.S. 308 (1893).

commentators on *Jantzen* have observed,[2] this conclusion disregards two important factors. First, when the Commission petitions for enforcement under the old procedure, a respondent cannot raise defenses available to him when the order was originally issued, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 476–77 (1952), and may not be able to deny that his price differentials injure competition. See Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865, 897–98 (1963). It is not clear whether he would be similarly barred if a new cease-and-desist order were sought, based upon alleged new violations. Compare, e.g., *Commissioner* v. *Sunnen*, 333 U.S. 591, 599–603 (1948); *FTC* v. *Raladam Co.*, 316 U.S. 149 (1942). See generally 2 Davis, Administrative Law Treatise §§ 18.02–.04 (1958). Second, after the Commission has found that a respondent has violated the Clayton Act, it may sometimes order him to refrain from acts which in themselves would not violate the Act. E.g., *FTC* v. *National Lead Co.*, 352 U.S. 419, 430 (1957). Thus the Commission would lose important advantages if it had to seek a new order instead of obtaining enforcement of an existing order.

The Ninth Circuit relied in its decision upon the omission of the old procedure when section 11 of the Clayton Act was amended "to read as follows," and its express retention for certain limited purposes by section 2 of the Clayton Finality Act. But the rule that amendment "to read as follows" repeals everything omitted, and the maxim *expressio unius est exclusio alterius*, are aids in the interpretation of statutes, not syllogisms. They must yield where their

[2] Kauper, FTC v. Jantzen: Blessing, Disaster, or Tempest in a Teapot?, 64 Mich. L. Rev. 1523, 1540–47 (1966); Recent Decision, 34 Geo. Wash. L. Rev. 939 (1966).

application would be inconsistent with the purposes of the statute. E.g., *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350–52 (1943); 1 Sutherland, Statutes and Statutory Construction § 2017 (3d ed. Horack 1943); 2 *id* § 4917. As we have stated, we believe that the *Jantzen* decision is inconsistent with the purpose of the Clayton Finality Act.[*] For these reasons we conclude that the Commission could petition for enforcement of its 1957 order.

We turn now to whether the order should be enforced in light of the new volume rebates which Standard made effective in 1961 and 1964.

* * * * *

[Parts II and III of the opinion are irrelevant for present purposes and have not been reproduced.]

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[*] Because we hold that the purpose of the Clayton Finality Act requires that the old procedure remain applicable to orders issued before it was passed, we need not consider whether an unenforced order is a "liability" which will be preserved by the General Savings Statute, 61 Stat. 635 (1947), 1 U.S.C. § 109, unless expressly abated by Congress. Compare *FTC* v. *Jantzen, Inc.*, 356 F. 2d 253, 260–61 (9 Cir.), cert. granted, 35 U.S. L. Week 3111 (Oct. 10, 1966), with e.g., *NLRB* v. *National Garment Co.*, 166 F. 2d 233 (8 Cir.), cert. denied, 344 U.S. 845 (1948).

SUPREME COURT OF THE UNITED STATES

No. 310.—October Term, 1966.

Federal Trade Commission, Petitioner, v. Jantzen, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 13, 1967.]

Mr. Justice Clark delivered the opinion of the Court.

This case involves the effect of the Finality Act of 1959, 73 Stat. 243, upon orders issued by the Federal Trade Commission under the Clayton Act, 38 Stat. 734, prior to the date of the former Act. The respondent claims that the Finality Act repealed the enforcement provisions of § 11 of the Clayton Act, 15 U. S. C. § 21 (1958 ed.), and that orders of the Commission entered prior to the enactment of the Finality Act are not now enforceable. The Court of Appeals agreed, held that it had no jurisdiction to enforce such orders and directed that the proceeding be dismissed. 356 F. 2d 253. In view of the pendency of almost 400 such orders and the conflict among the Circuits [1] on the point, we granted certiorari. — U. S. —.

I.

The facts are not disputed, save on points not relevant here, and will not be stated in detail. Jantzen manufactures men's, women's, and children's apparel. On September 4, 1958, it was charged by the Commission with having violated § 2 (d) of the Clayton Act by allowing discriminatory advertising and promotional allowances to certain of its customers. Jantzen did not answer

[1] See *Federal Trade Comm'n* v. *Pacific-Gamble-Robinson Co.*, No. 18260 (C. A. 9th Cir.); *Federal Trade Comm'n* v. *Benrus Watch Co.*, No. 27752 (C. A. 2d Cir.), and the instant case.

the complaint. However, it consented to the entry of a cease-and-desist order against it prohibiting further discrimination in advertising and promotional activities. This agreement and a form of order was approved by a hearing examiner and on January 16, 1959, the order was adopted by the Commission. On July 22, 1964, some five years after the adoption of the Finality Act, the Commission ordered an investigation into charges that Jantzen had violated the 1959 consent order. Jantzen stipulated before a hearing examiner that it had violated the consent order by granting discriminatory allowances to customers in Chattanooga, Tenn., and Brooklyn, N. Y. The Commission thereafter concluded that Jantzen had violated the order. It then applied to the Court of Appeals for an order affirming and enforcing the original orders. The application was based on the provisions of the third paragraph of § 11 of the original Clayton Act, which authorized the Commission, in the event such an order was not obeyed, to apply to a court of appeals for its "enforcement." Jantzen claimed that the amendment of § 11 by the Finality Act resulted in a repeal of the Commission's authority to seek, and the courts to grant, affirmance and enforcement of such orders. The Court of Appeals agreed and dismissed the application for lack of jurisdiction. We reverse and remand the proceedings for further consideration in light of this opinion.

II.

We start with the proposition that the Congress intended by its enactment of the Finality Act of 1959 to strengthen the hand of the Commission in the enforcement of the Clayton Act. As the report of the Committee on the Judiciary of the Senate stated: "The effectiveness of the Clayton Act . . . has long been handicapped by the absence of adequate enforcement provisions. . . . S. 726 would put teeth into Clayton Act orders and would fill the enforcement void which has existed for many years."

S. Rep. No. 83, 86th Cong., 1st Sess., 3–4 (1959). The procedures existing prior to the adoption of the Finality Act required the Commission to investigate, and after complaint, prove a violation of the Clayton Act before it could issue a cease-and-desist order. After its issuance a violation of the order must be investigated and proved before the Commission may obtain an order compelling its obedience. Only then could a court of appeals order enforcement. And under *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470 (1952), a contempt proceeding would not lie except on allegations of violation of the Act a third time and proof of a failure or refusal to obey the Commission's order, previously affirmed.

The Finality Act eliminated these "laborious, time consuming and very expensive" procedures. S. Rep. No. 83, *supra*. As Congressman Huddleston, one of the principal supporters of the bill which later became the Act, stated to the House:

> "The bill . . . is in effect a perfecting amendment to the Clayton Act. It has no other purpose than to effect the will of Congress with respect to the role of the Federal Trade Commission in Clayton Act enforcement in the same manner and to the same degree that the will of Congress was effectuated by the Wheeler-Lea amendments to the Federal Trade Commission Act." 105 Cong. Rec. 12732.

The remarks of Congressman Celler, Chairman of the House Judiciary Committee, of Congressman Roosevelt and of other supporters of the bill were substantially the same. 105 Cong. Rec. 12730–12733.

The Wheeler-Lea Amendment clarified the procedures of the Federal Trade Commission Act but did not amend those of the Clayton Act. Under the Wheeler-Lea Amendment orders issued by the Commission were to become final 60 days after their issuance or upon affirmance by a court of appeals in which a petition for review

had been filed. However, § 5 (a) of the Amendment expressly provided that outstanding final orders at the time of the adoption of the Amendment would become final 60 days after the latter date or upon affirmance in review proceedings instituted during that 60-day period. The Finality Act instead of using the language of § 5 (a) of the Wheeler-Lea Amendment contains a special § 2 which reads as follows:

> "The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the [Clayton] Act . . . . Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act."

The Court of Appeals thought the use of this language was significant in that, unlike § 5 (a), it "does not deal with cease and desist orders issued before its effective date, nor provide for their becoming final within the meaning of the amended Act. It deals solely with proceedings begun in a Court of Appeals . . . . Thus the third paragraph [of § 11] is expressly continued in effect for this very limited purpose, namely, the completion of proceedings for enforcement initiated by the Commission in a Court of Appeals . . . . [T]his is a strong indication that the Congress knew, and intended, that it was repealed for other purposes." The Court of Appeals buttressed this reading of the Finality Act by noting that the Commission originally took the position "that existing Clayton Act orders would become final in 60 days, under the new law, just as under the Wheeler-Lea Act . . . ." See *Sperry Rand Corp.* v. *F. T. C.*, 288 F. 2d 403 (1961); *F. T. C.* v. *Nash-Finch Co.*, 288 F. 2d 407 (1961). From this, the Court indicated that this change of position by the Commission pointed up its conclusion that "the repeal in this case was express."

III.

We cannot agree. One error of the Court of Appeals seems to be the limited scope it gives the phrase "*proceeding* initiated before the date of the enactment of this Act." (Emphasis supplied.) The Court of Appeals thought this included only the *application* for enforcement under paragraph three or the *petition for review* under paragraph four of the original § 11 of the Act. We think not. We believe the word "proceeding" was used in the sense that it was employed throughout § 11 prior to the Amendment, namely the action brought by the Commission against the alleged violator of the Clayton Act. It follows that the "proceeding initiated" meant the filing of the "proceeding" before the Commission and was not limited to the application for enforcement or petition for review. This is made clear to us by the last sentence of § 2: "Each such proceeding shall be governed by the provisions of such *section* [§ 11 of the Clayton Act] as they existed on the day preceding the date of enactment of this Act." We emphasize that here the Congress said "section" not paragraphs 3–7, inclusive, of the section. It follows that the provisions of the entire section were preserved intact and governed all orders predating the Finality Act. The apparent reason for this variance from the procedure of the Wheeler-Lea Act was because of the heavy penalties which the Congress attached to the violation of final orders of the Commission under the Finality Act.[2] It, therefore, wished to make clear that not only applications for enforcement of pre-Finality Act orders and petitions for review of such orders but any action of the Commission with reference to pre-Finality Act orders would be governed by the provisions of § 11 of the Clayton Act "as they existed on the day

[2] The penalties were raised to $5,000 for each day in which a violation continued.

preceding the date of enactment of this [Finality] Act.'" We believe that this interpretation is implicit in our opinion on the second review by this Court of *Federal Trade Comm'n* v. *Henry Broch & Co.*, 368 U. S. 360 (1962), where MR. JUSTICE BRENNAN held that the 1959 amendments to § 11 of the Clayton Act "do not apply to enforcement of the instant order." At p. 365. In note 5, on p. 365, the opinion pointed out that the order "was entered by the Commission on December 10, 1957. The procedures enacted by the 1959 amendments therefore do not apply to it. See *Sperry Rand Corp.* v. *Federal Trade Comm'n*, 110 U. S. App. D. C. 1, 288 F. 2d 403." It is significant that *Sperry Rand* specifically held that "[e]nforcement due to any violation of the [pre-Finality Act] consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered." At 406. Such a holding here is supported not only by the fact that the Finality Act nowhere denies the Commission the power to enforce pre-existing orders. At most its provisions are silent with regard to such authority. Furthermore, the caption of the Finality Act itself as well as the legislative history gives added weight to our interpretation. The caption recites the purpose of the Act to be "to provide for the more expeditious enforcement of cease and desist orders . . . ." 73 Stat. 243. Such a purpose would certainly not include making approximately 400 orders dead letters. As we have noted previously the legislative history shows beyond contradiction that not only its sponsors but the responsible committees reporting the bill for passage believed "that this legislation will strengthen the enforcement provisions of Section 11 of the Clayton Act . . . ." Giving some 400 proven violators absolution from prior orders of the Commission would hardly comport with such a congressional intent. The Court of Appeals bottomed its opinion on the language used in the opening sentence of

subsection (c) of the Finality Act reading that the "third, fourth, fifth, sixth and seventh paragraphs of" § 11 of the Clayton Act "are amended to read as follows." But we must read the Act as a whole as we have § 2 heretofore. And in so doing we cannot, as MR. JUSTICE HARLAN said, ignore the "common sense, precedent and legislative history" of the setting that gave it birth. *United States* v. *Standard Oil Co.*, 384 U. S. 224, 225 (1966). And as Mr. Justice Holmes said many years ago:

> "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson* v. *United States*, 163 F. 30, 32 (1908).

But whether we are correct in our application and interpretation we have concluded that a sensible construction of the Finality Act compels the opposite result reached by the Court of Appeals. It would grant review and enforcement of proceedings under the old procedures where the petition for review or the application for enforcement was filed prior to the date of the enactment of the Finality Act but orders from which no petition or application was ever filed would not be capable of enforcement. This would subject the violator who sought review to the sanctions of the section but those who had not sought review would be free to violate orders against them with impunity. Consequently, almost 400 separate violators would be forgiven. It is no answer to say that the Commission could file new complaints which would come under the new procedures.

The fact is that some 400 particularized orders written to correct specific mischief violative of the Clayton Act would be unenforceable. There is quite a difference between proving up a violation of the Clayton Act and a failure to obey a specific order of the Commission. Long, tedious, and costly investigation, proof of injury to competition as well as other affirmative requirements necessary to the issuance of an order and many defenses such as cost justification, meeting competition, exclusive dealing, etc., are all avoided. Particularly in merger cases would the enforcement of prior orders be simplified and expedited.

In view of all of these considerations we cannot say that the author of the Finality Act and its sponsors—all stalwart champions of effective antitrust enforcement—would have intended to strip the Commission of all of its enforcement weapons with reference to some 400 concerns already adjudged to be Clayton Act violators. Nor could we ascribe to a Congress that has so clearly expressed its will any such result. We can only say that as between choices Congress rejected only one, namely, that of the Wheeler-Lea Act's 60-day review provision. Certainly it intended that the old procedures would apply to proceedings on petition for review or application for enforcement. There is no evidence that it intended to put the pre-1959 orders into the discard. We remain more faithful to the Act, we think, when we find that they too are enforceable under the old procedures.

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

While I confess to great difficulty in driving through the statute to the Court's conclusion, I am content to acquiesce in my Brother CLARK's opinion with the added help of the Second Circuit's opinion in *FTC* v. *Standard Motor Products, Inc.*, — F. 2d —.